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PROPOSITION TO HIS MAJESTY,

BY

Sir FRANCIS BACON, Knt.

His MAJESTY's Attorney-General, and one
of his Privy-Council; touching the Com-
piling, and Amendment of the LAWS of
ENGLAND.

YOUR MAJESTY,

OF your favour, having made me privy-
counsellor, and continuing me in the
place of your attorney-general, (which
is more than was these hundred years
before,) I do not understand it to be, that by
putting off the dealing in causes, between party
and Party, I should keep holy-day the more; but
that I should dedicate my time to your service
with less distraction. Wherefore, in this plen-
tiful accession of time, which I have now gained, I
take it to be my duty, not only to speed your

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command.

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commandments, and the busines of my place ; but to meditate and to excogitate, of my self, wherein I may best, by my travels, derive your virtues to the good of your people ; and return their thanks and increase of love to you again. And after I had thought of many things, I could find, in my judgment, none more proper for your Majesty, as a master, nor for me, as a workman, than the reducing and recompiling of the laws of England.

YOUR Majesty is a King, blessed with posterity ; and these Kings sort best with acts of perpetuity, when they do not leave them, instead of children ; but transmit both line and merit to future generations. You are a great master in justice and judicature ; and it were pity that the fruit of that virtue should die with you. Your Majesty also reigneth in learned times ; the more, in regard of your own perfections and patronage of learning ; and it hath been the mishap of works of this nature, that the less learned time hath wrought upon the more learned, which now will not be so. As for my self, the law is my profession, to which I am a debtor. Some little helps I may have of other learning, which may give form to matter ; and your Majesty hath set me in an eminent place, whereby in a work which must be the work of many, I may the better have coadjutors. Therefore, not to hold your Majesty with any long preface, in that which I conceive to be nothing less than words, I will proceed to the matter ; which matter itself nevertheless requireth somewhat briefly to be said, both of the dignity, and likewise of the safety, and convenience of this work : and then to go to the main ; that is to say, to shew how the work is to be done : which incidently also will best demonstrate, that it is no vast nor speculative thing, but a real and feasible. *Callisthenes*, that followed *Alexander's* court, and was grown in some displeasure with him, because he could not well

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well brook the *Perſian* adoration ; at a ſupper (which with the *Grecians* was ever a great part talk) was desired, because he was an eloquent man, to ſpeak of ſome theme, which he did ; and chose for his theme, the praife of the *Macedonian* nation, which though it were but a filling thing to praife men to their faces, yet he did it with ſuch advantage of truth, and avoidance of flattery, and with ſuch life, as the hearers were ſo ravished with it, that they pluckt the roses off from their garlands, and threw them upon him ; as the manner of applaues then was : *Alexander* was not pleased with it, and by way of discountenance ſaid, It was eaſy to be a good orator, in a pleaſing theme. But (ſaith he to *Callistbenes*,) turn your ſtyle, and tell us now of our faults, that we may have the profit, and not you only the praife : which he preſently did with ſuch a force, and ſo piquantly, that *Alexander* ſaid, The goodneſs of his theme had made him eloquent before ; but now it was the malice of his heart, that had inspired him.

1. SIR, I ſhall not fall into either of thoſe two extremes, concerning the laws of *England* ; they commend themſelves best to them that understand them ; and your Maieſty's chief Justice of your bench hath in his writings magnified them not without cause : certainly they are wiſe, they are juſt, and moderate laws ; they give to God, they give to *Cæſar*, they give to the ſubjects that which appertaineth. It is true, they are as mixt as our language, compounded of *British*, *Roman*, *Saxon*, *Danish*, *Norman* cuſtoms. And as our language is ſo much the richer, ſo the laws are the more complete : neither does this attribute leſs to them, than thoſe that would have them to have ſtood out the fame in all mutations ; for no tree is ſo good firſt ſet, as by transplanting.

2. As for the ſecond extreme, I have nothing to do with it, by way of taxing the laws. I ſpeak only by way of perfecting them, which is eaſieſt

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in the best things ; so that which is far amiss, hardly receiveth amendment ; but that which hath already, to that more may be given. Besides, what I shall propound is not to the matter of the laws, but to the manner of their registry, expression, and tradition ; so that it giveth them rather light than any new nature. This being so, for the dignity of the work I know scarcely where to find the like ; for surely that scale, and those degrees of sovereign honour, are true and rightly marshalled. First, the founders of estates ; then the law-givers ; then the deliverers and saviours after long calamities ; then the fathers of their countries, which are just and prudent princes ; and lastly, conquerors, which honour is not to be received amongst the rest, except it be, where there is an addition of more country and territory to a better government, than that was of the conquered. Of these, in my judgment, your Majesty may with more truth than flattery be intitled to the first, because of your uniting of *Britain* and planting *Ireland*, both which favour of the founder. That which I now propound to you, may adopt you also into the second : law-givers have been called *principes perpetui* ; because, as bishop *Gardiner* said in a bad sense, that he would be bishop an hundred years after his death, in respect of the long leases he made : so law-givers are still Kings and Rulers after their decease, in their laws. But this work, shining so in itself, needs no taper. For the safety and convenience thereof, it is good to consider, and to answer those objections or scruples which may arise, or be made against this work.

Obj. i. THAT it is a thing needless ; and that the law, as it now is, is in good estate, comparable to any foreign law ; and that it is not possible for the wit of man, in respect of the frailty thereof, to provide against the incertainties and evasions, or omissions of law.

Resp.

Resp. For the comparison with foreign laws, it is in vain to speak of it; for men will never agree about it. Our lawyers will maintain for our municipal laws; civilians, scholars, travellers, will be of the other opinion.

But certain it is, that our laws, as they now stand, are subject to great incertainties, and variety of opinion, delays and evasions: whereof ensueth,

1. THAT the multiplicity and length of suits is great.

2. THAT the contentious person is armed, and the honest subject wearied and oppressed.

3. THAT the judge is more absolute; who, in doubtful cases, hath a greater stroke and liberty.

4. THAT the chancery courts are more filled, the remedy of law being often obscure and doubtful.

5. THAT the ignorant lawyer shroudeth his ignorance of law, in that, doubts are so frequent and many.

6. THAT mens assurances of their lands and estates by patents, deeds, wills, are often subject to question, and hollow; and many the like inconveniences.

IT is a good rule and direction (for that all laws, *secundum magis & minus*, do participate of incertainties,) that followeth: Mark, whether the doubts that arise are only in cases of ordinary experience, or which happen not every day: If in the first only, impute it to frailty of man's foresight, that cannot reach by law to all cases; but if in the latter, be assured there is a fault in the law. Of this I say no more, but that (to give every man his due) had it not been for Sir Edward Coke's reports (which, though they may have errors, and some peremptory and extrajudicial resolutions, more than are warranted; yet they contain infinite good decisions, and rulings over of

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cases,) the law by this time had been almost like a ship without ballast ; for that the cases of modern experience, are fled from those that are adjudged and ruled in former time. But the necessity of this Work is yet greater in the statute law. For first, there are a number of ensnaring penal laws, which lie upon the subject ; and if in bad times they should be awaked, and put in execution, would grind them to powder.

THERE is a learned civilian that expoundeth the curse of the prophet; *Pluet super eos laqueos,* of multitude of penal laws ; which are worse than showers of hail or tempest upon cattle, for they fall upon men.

THERE are some penal laws fit to be retained, but their penalty too great ; and it is ever a rule, that any over-great penalty, (besides the acerbity of it) deads the execution of the law.

THERE is a farther inconvenience of penal laws, obsolete, and out of use ; for that it brings a gangrene, neglect, and habit of disobedience upon other wholesome laws, that are fit to be continued in practice and execution ; so that our laws endure the torment of *Mezentius* :

The living die in the arms of the dead.

LASTLY, There is such an accumulation of statutes concerning one matter, and they so crofs and intricate, as the certainty of law is lost in the heap ; as your Majesty had experience last day upon the point, Whether the incendiary of Newmarket should have the benefit of his clergy.

Obj. i. THAT it is a great innovation ; and innovations are dangerous beyond foresight.

Resp. ALL purgings and medicines, either in the civil or natural body, are innovations : so as that argument is a common place against all noble reformations. But the truth is, that this work ought not to be termed or held for any innovation

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tion in the suspected sense. For those are the innovations which are quarrelled and spoken against, that concern the consciences, estates, and fortunes of particular persons : but this of general ordinance pricketh not particulars, but passeth *sine strepitu*. Besides, it is on the favourable part ; for it easeth, it presseth not : and lastly, it is rather matter of order and explanation, than of alteration. Neither is this without president in former governments.

THE Romans, by their *Decemviri*, did make their twelve tables ; but that was indeed a new enacting or constituting of laws, not a registering or recompiling ; and they were made out of the laws of the Grecians, not out of their own customs.

IN Athens they had *Sexviri*, which were standing commissioners to watch and to discern what laws waxed unproper for the time ; and what new law did, in any branch, cross a former law, and so, *ex officio*, propounded their repeals.

KING Lewis XI of France, had it in his intention to have made one perfect and uniform law, out of the civil law Roman, and the provincial customs of France.

JUSTINIAN the Emperor, by commissions directed to divers persons learned in the laws, reduced the Roman laws from vastness of volume, and a labyrinth of uncertainties, unto that course of the civil law which is now in use. I find here at home of late years, that King Henry VIII, in the twenty seventh of his reign, was authorized by parliament to nominate thirty two commissioners, part ecclesiastical, part temporal, to purge the canon law, and to make it agreeable to the law of God, and the law of the realm ; and the same was revived in the fourth year of Edw. VI, though neither took effect.

FOR the laws of Lycurgus, Solon, Minos, and others of antient time, they are not the worse,

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because grammar scholars speak of them : but things too antient wax children with us again.

E D G A R, the *Saxon King*, collected the laws of this Kingdom, and gave them the strength of a faggot bound, which formerly were dispersed.

THE statutes of King *Edward the First* were fundamental ; but, I doubt, I err, in producing so many examples ; for as *Cicero* saith to *Cæsar*, so may I say to your Majesty.

Nil vulgare te dignum videri posse.

Obj. 3. IN this purging of the course of the common laws and statutes, much good may be taken away.

Resp. IN all purging, some good humours may pass away ; but that is largely recompensed, by lightening the body of much bad.

Obj. 4. LABOUR were better bestowed, in bringing the common laws of *England* to a text law, as the statutes are, and setting both of them down in method and by titles.

Resp. IT is too long a business to debate, whether *lex scripta, aut non scripta*, a text law, or customs well registered, with received and approved grounds and maxims, and acts and resolutions judicial from time to time duly entered and reported, be the better form of declaring and authorizing laws. It was the principal reason or oracle of *Lycurgus*, that none of his laws should be written. Customs are laws written in living tables ; and some traditions the church doth not disauthorize. In all sciences they are the soundest, that keep close to particulars ; and sure I am, there are more doubts that rise upon our statutes, which are a text law, than upon the common law, which is no text law. But, howsoever that question be determined, I dare not advise to cast the law into a new mould. The work

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work which I propound tendeth to pruning and grafting the law, and not to plow up and planting it again ; for such a remove I should hold indeed for a perilous innovation.

Obj. 5. It will turn the judges, counsellors of law, and students of law to school again, and make them to seek what they shall hold and advise for law ; and it will impose a new charge upon all lawyers, to furnish themselves with new books of law.

Resp. For the former of those, touching the new labour, it is true it would follow, if the law were new moulded into a text law ; for then men must be new to begin, and that is one of the reasons for which I disallow that course.

But in the way that I shall now propound, the entire body and substance of law shall remain, only discharged of idle and unprofitable, or hurtful matter ; and illustrated by order and other helps, towards the better understanding of it, and judgment thereupon.

For the latter, touching the new charge, it is not worth the speaking of, in a matter of so high importance ; it might have been used of the new translation of the bible, and such like works. Books must follow sciences, and not sciences books.

The Work itself; and the way to reduce and recompile the LAWS of ENGLAND.

THIS work is to be done (to use some few words which is the language of action and effect) in this manner.

It consisteth of two parts ; the digest or recompiling of the common laws ; and that of the statutes,

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IN the first of these three things are to be done.

1. THE compiling of a book, *de antiquitatibus juris.*

2. THE reducing or perfecting of the course or corps of the common laws.

3. THE composing of certain introductory and auxiliary books touching the study of the laws.

FOR the first of these, all antient records in your Tower, or elsewhere, containing acts of parliament, lords patents, commissions, and judgments, and the like, are to be searched, perused, and weighed : And out of these are to be selected those that are of most worth and weight, and in order of time not of titles, (for the more conformity with the year-books,) to be set down and register'd, rarely, *in hac verba*; but summed with judgment, not omitting any material part ; these are to be used for reverend precedents, but not for binding authorities.

FOR the second, which is the main, there is to be made a perfect course of the law *in serie temporis*, or year-books, (as we call them) from Edward the First to this day : in the compiling of this course of law, or year-books, the points following are to be obserued.

FIRST, all cases which are at this day clearly no law, but constantly ruled to the contrary, are to be left out ; they do but fill the volumes, and season the wits of students in a contrary sense of law. And so likewise all cases, wherein that is solemnly and long debated, whereof there is now no question at all, are to be entered as judgments only, and resolutions, but without the arguments, which are now become but frivolous, yet for the observation of the deeper sort of lawyers, that they may see how the law hath altered, out of which they may pick sometimes good use, I do advise, that upon the first in time of those obsolete cases, there were a *memorandum* set, that at that time

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to become the law was thus taken, until such a time,

SECONDLY, *Homonymiae*, (as *Justinian calleth* them) that is, cases merely of iteration and repetition, are to be purged away; and the cases of identity, which are best reported and argued, to be retained instead of the rest; the judgments nevertheless to be set down, every one in time as it stands in they are, but with a quotation or reference to the part of case where the point is argued at large; but if the case consist part of repetition, part of new used matter, the repetition is only to be omitted.

THIRDLY, As to the *Antinomiae*, cases judged to the contrary, it were too great a trust to refer to the judgment of the composers of this work, to decide the law either way, except there be a current stream of judgments of later times; and then reckon the contrary cases amongst cases obsolete, of which I have spoken before; nevertheless this diligence would be used, that such cases of contradiction be specially noted and collected, to the end those doubts, that have been so long militant, may either by assembling all the judges in the exchequer chamber, or by parliament, be put into certainty. For to do it by bringing them in question under feigned parties, is to be disliked. *Nil abeat forum ex scena.*

FOURTHLY, All idle queries, which are but seminaries of doubts and incertainties, are to be left out and omitted, and no queries set down, but of great doubts well debated and left undecided for difficulty; but no doubting or upstarting queries, which though they be touched in argument for explanation, yet were better to die than to be put into the books.

LASTLY, cases reported with too great prolixity, would be drawn into a more compendious report; not in the nature of an abridgment, but autocopies and impertinences to be cut off: as for misprinting, and insensible reporting, which many

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many times confound the students, that will be obiter amended; but more principally, if there be any thing in the report which is not well warranted by the record, that is also to be rectified: the course being thus compiled, then it resteth but for your Majesty to appoint some grave and sound lawyers, with some honourable stipend, to be * reporters for the time to come, and then this is settled for all times.

FOR the auxiliary books that conduce to the study and science of the law, they are three Institutions; a treatise *De regulis juris*; and a better book *De verborum significationibus*, or term of the law. For the Institutions, I know well there be books of introductions (wherewith students begin) of good worth, especially Littleton and Fitzherbert's *Natura brevium*; but they are no ways of the nature of an institution; the office whereof is to be a key and general preparation to the reading of the course. And principally it ought to have two properties; the one a perspicuous and clear order or method; and the other, an universal latitude or comprehension, that the students may have a little pre-notion of every thing, like a model towards a great building. For the treatise *De regulis juris*, I hold it, of all other things, the most important to the health (as I may term it) and good institutions of any laws; it is indeed like the ballast of a ship, to keep all upright and stable; but I have seen little in this kind, either in our law, or other laws, that satisfieth me. The naked rule or maxim doth not the effect: It must be made useful by good differences, ampliations, and limitations, warranted by good authorities; and this not by raising up of quotations and references, but by discourse and

* This Constitution of Reporters I obtained of the King after I was Chancellor; and there are two appointed with 100 £. a year piece stipend.

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ment in a just tractate. In this I have
travelled myself, at the first more cursorily, since
with more diligence, and will go on with it, if
God and your Majesty will give me leave. And
do assure your Majesty, I am in good hope,
that when Sir Edward Coke's reports, and my rules
and decisions shall come to posterity, there will
be (whatsoever is now thought) question, who was
the greater lawyer? For the books of the terms of
the law there is a poor one, but I wish a diligent
one, wherein should be comprised not only the
exposition of the terms of law, but of the words
of all antient records and precedents.

For the abridgments I could wish, if it were
possible, that none might use them, but such as
had read the course first, that they might serve
as repertories to learned lawyers, and not to make
lawyer in haste; but since that cannot be, I wish
there were a good abridgment composed of the
two that are extant, and in better order. So
much for the common law.

Statute Law.

FOR the reforming and recompiling of the sta-
tute law, it consisteth of four parts.

1. THE first, to discharge the books of those
statutes, whereas the case, by alteration of time, is
vanished: as *Lombards*, *Jews*, *Gauls* half-pence, &c.
Those may nevertheless remain in the libraries for
antiquities, but no reprinting of them. The like
of statutes long since expired and clearly repealed;
for if the repeal be doubtful, it must be so pro-
pounded to the parliament.

2. THE next is, to repeal all statutes which are
sleeping and not of use, but yet snaring and in
force; in some of those it will perhaps be requi-
site to substitute some more reasonable law instead
of

A PROPOSAL FOR AMENDING, &c.

of them agreeable to the time ; in others a simple repeal may suffice.

3. THE third, that the grievousness of the penalty in many statutes be mitigated, though the ordinances stand.

4. THE last is, the reducing of concurrent statutes heaped one upon another to one clear and uniform law. Towards this there hath been already, upon my motion, and your Majesty's direction, a great deal of good pains taken ; my Lord *Hobart*, myself, Serjeant *Finch*, Mr. *Heneage Finch*, Mr. *Noye*, Mr. *Hackwell*, and others, whose labour being of a great bulk, it is not fit now to trouble your Majesty with any further particularity therein : only by this you may perceive the work is already advanced : but because this part of the work, which concerneth the statute laws, must of necessity come to parliament, and the houses will best like that which themselves guide, and the persons that themselves employ, the way were to imitate the precedent of the commissioners for the canon laws in 27 Hen. VIII. and 4 Edw. VI. and the commissioners for the union of the two realms, *primo* of your Majesty, and so to have the commissioners named by both houses ; yet not with a precedent power to conclude, but only to prepare and propound to parliament : this is the best way, I conceive, to accomplish this excellent work, of honour to your Majesty's times, and of good to all times ; which I submit to your Majesty's better judgment.

AN
OFFER
TO
King JAMES,
OF A
DIGEST

To be made of the
LAWS of ENGLAND.

Most EXCELLENT SOVEREIGN,

A MONGST the degrees and acts of sovereign, or rather heroical honour, the first or second is the person and merit of a law-giver. Princes that govern well are fathers of the people: But if a Father breed his son well, or allow him well while he liveth, but leave him nothing at his death, whereby both he and his children, and his childrens children may be the better, surely the care and piety of a father is not in him complete. So Kings, if they make a portion of an age happy by their good government, yet if they do not make testaments (as God Almighty doth) whereby a perpetuity of good may descend to their country, they are but mortal and transitory

AN OFFER OF A DIGEST

tory benefactors. *Domitjan*, a few days before he died, dreamed that a golden head did rise upon the nape of his neck : which was truly performed in the golden age that followed his times for five successions. But Kings, by giving their subjects good laws, may (if they will) in their own time, join and graft this golden head upon their own necks after their death. Nay, they may make *Nabuchodonozor's* image of monarchy golden from head to foot. And if any of the meaner sort of politicks, that are slighted only to see the worst of things, think, that laws are but cobwebs, and that good Princes will do well without them, and bad will not stand much upon them ; the discourse is neither good nor wise. For certain it is, that good laws are some bridle to bad Princes, and as a very wall about government. And if tyrants sometime make a breach into them, yet they mollify even tyranny itself, as *Solon's* laws did the tyranny of *Pisistratus* : and then commonly they get up again, upon the first advantage of better times. Other means to perpetuate the memory and merits of sovereign Princes are inferior to this. Buildings of temples, tombs, palaces, theatres, and the like, are honourable things, and look big upon posterity : But *Constantine the Great* gave the name well to those works, when he used to call *Trajan* that was a great builder, *Parietaria*, wall-flower, because his name was upon so many walls : So if that be the matter, that a King would turn wall-flower, or pellitory of the wall, with cost he may. *Adrian's* vein was better, for his mind was to wrestle a fall with time, and being a great progressor through all the Roman Empire, whenever he found any decays of bridges, or highways, or cuts of rivers and sewers, or walls, or banks, or the like, he gave substantial order for their repair with the better. He gave also multitudes of charters and liberties for the comfort of corporations and companies in decay : so that his bounty did

strive with the ruins of time. But yet this, though it were an excellent disposition, went but in effect to the cases and shells of a commonwealth. It was nothing to virtue or vice. A bad man might indifferently take the benefit and ease of his ways and bridges as well as a good; and bad People might purchase good charters. Surely the better works of perpetuity in Princes, are those that wash the inside of the cup. Such as are foundations of colleges and lectures for learning and education of youth; likewise foundations and institutions of orders and fraternities, for nobleness, enterprise, and obedience, and the like. But yet these also are but like plantations of orchards and gardens, in plots and spots of ground here and there; they do not till over the whole kingdom and make it fruitful, as doth the establishing of good laws and ordinances, which makes a whole nation to be as a well ordered college or foundation.

THIS kind of work in the memory of times, is rare enough to shew it excellent; and yet not so rare as to make it suspected for impossible, inconvenient, or unsafe. *Moses*, that gave laws to the *Hebrews*, because he was the scribe of God himself, is fitter to be named for honour's sake to other law-givers, than to be numbred or ranked amongst them. *Minos*, *Lycurgus*, and *Solon*, are examples for themes of grammar scholars. For ancient personages and characters now adays use to wax children again; though that parable of *Pindarus* be true, the best thing is water: for common and trivial things are many times the best, and rather despised upon pride, because they are vulgar, than upon cause or use. Certain it is, that the laws of those three law-givers had great prerogatives. The first of fame, because they were the pattern amongst the *Grecians*: The second of lasting, for they continued longest without altera-

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tion: The third, of a spirit of reviver, to be often oppressed, and often restored.

AMONGST the seven kings of *Rome* four were law-givers: for it is most true, that a discourser of *Italy* faith, There was never state so well swaddled in the infancy, as the *Roman* was by the virtue of their first Kings; which was a principal cause of the wonderful growth of that state in after times.

T H E Decemvirs laws were laws upon laws, not the original; for they grafted laws of *Græcia*, upon *Roman* stock of laws and customs: But such was their success, as the twelve tables which they compiled were the main body of the laws which framed and wielded the great body of that estate. These lasted a long time, with some supplementals and the Praetorian edicts in *Albo*; which were, in respect of laws, as writing tables in respect of bras; the one to be put in and out, as the other is permanent. *Lucius Cornelius Sylla* reformed the laws of *Rome*: For that man had three singularities, which never tyrant had but he; That he was a law-giver; that he took part with the nobility, and that he turned private man, not upon fear, but upon confidence.

CÆSAR long after desired to imitate him only in the first, for otherwise he relied upon new men; and for resigning his power *Seneca* describeth him right: *Cæsar gladium citò condidit, nunquam posuit.* *Cæsar* soon sheathed his sword, but never put it off. And himself took it upon him, saying in scorn of *Sylla*'s resignation; *Sylla nescivit literas, dictare non potuit,* *Sylla* knew no letters, he could not dictate. But for the part of a law-giver, *Cicero* giveth him the attribute; *Cæsar si ab eo quereretur, quid egisset in togâ;* *leges se respondisset multas & præclaras tulisse;* if you had asked *Cæsar* what he did in the gown, he would have answered, that he made many excellent laws. His nephew *Augustus* did tread the same

fame steps, but with deeper print, because of his long reign in peace; whereof one of the poets of his time saith,

*Pace datâ terris, animum ad civilia vertit
Jura suum; legesq; tulit justissimus autor.*

FROM that time there was such a race of wit and authority between the commentaries and decisions of the lawyers, and the edicts of the Emperors, as both laws and lawyers were out of breath. Whereupon *Justinian* in the end recompiled both, and made a body of laws such as might be wielded, which himself calleth gloriously, and yet not above truth, the edifice or structure of a sacred temple of justice, built indeed out of the former ruins of books, as materials, and some novel constitutions of his own.

IN *Athens* they had *Sexviri*, (as *Æschines* observeth) which were standing commissioners, who did watch to discern what laws waxed improper for the times, and what new law did in any branch cross a former law, and so *ex officio* propounded their repeal.

KING *Edgar* collected the laws of this kingdom, and gave them the strength of a faggot bound, which formerly were dispersed; which was more glory to him than his sailing about this island with a potent fleet: for that was, as the scripture saith, *Via navis in mari*; the way of a ship in the sea, it vanished, but this lasteth. *Alfonso* the wise, (the ninth of that name) King of *Castile*, compiled the digest of the laws of *Spain*, intitled the *Siete Partidas*; an excellent work which he finished in seven Years. And as *Tacitus* noteth well, that the capitol, though built in the beginnings of *Rome*, yet was fit for the great monarchy that came after; so that building of laws sufficeth the greatness of the empire of *Spain*, which since hath ensued.

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LEWIS XI. had it in his mind (though he performed it not) to have made one constant law of *France*, extracted out of the civil *Roman* law, and the customs of provinces which are various, and the kings edicts, which with the *French* are statutes. Surely he might have done well, if like as he brought the crown (as he said himself) from *Page*, so he had brought his People from *Lackey*; not to run up and down for their laws to the civil law, and the ordinances and the customs, and the dispositions of courts and discourses of philosophers, as they use to do.

KING HENRY VIII. in the twenty seventh year of his reign, was authorized by parliament to nominate thirty two commissioners, part ecclesiastical, and part temporal, to purge the canon law, and to make it agreeable to the law of God, and the law of the land; but it took not effect: for the acts of that king were commonly rather profilers and famers, than either well grounded, or well pursued: but I doubt, I err in producing so many examples. For as *Cicero* said to *Cæsar*, so may I say to your Majesty, *Nil vulgare te dignum videri posse*. Though indeed this well understood is far from vulgar: For that the laws of the most kingdoms and states, have been like buildings of many pieces, and patched up from time to time according to occasions, without frame or model.

Now for the laws of *England*, (if I shall speak my opinion of them without partiality either to my profession or country,) for the matter and nature of them, I hold them wise, just and moderate laws: they give to God, they give to *Cæsar*, they give to the subject what appertaineth. It is true they are as mixt as our language, compounded of *British*, *Roman*, *Saxon*, *Danish*, *Norman* customs. And surely as our language is thereby so much the richer, so our laws are likewise by that mixture the more complete.

NEITHER doth this attribute less to them, than those that would have them to have stood out the same in all mutations. For no tree is so good first set, as by transplanting and grafting. I remember what happened to *Callisthenes*, that followed *Alexander's* court, and was grown into some displeasure with him because he could not well brook the *Persian* adoration. At a supper which with the *Grecians* was a great part talk,) he was desired (the King being present) because he was an eloquent man, to speak of some theme, which he did; and chose for his theme, the praise of the *Macedonian* nation, which though it were but a filling thing to praise men to their faces, yet he performed it with such advantage of truth, and avoidance of flattery, and with such life, as was much applauded by the hearers. The King was the less pleased with it, not loving the man, and by way of discountenance said: It was easy to be a good orator in a pleasing theme. But, saith he to him, turn your style, and tell us now of our faults, that we may have the profit, and not you the praise only; which he presently did with such quickness, that *Alexander* said, That malice made him eloquent then, as the theme had done before. I shall not fall into either of these extremes, in this subject of the laws of *England*; I have commended them before for the matter, but surely they ask much amendment for the form; which to reduce and perfect, I hold to be one of the greatest dowries that can be conferr'd upon this kingdom; which work, for the excellency, as it is worthy your Majesty's act and times, so it hath some circumstance of propriety agreeable to your person. God hath blessed your Majesty with posterity, and I am not of opinion that Kings that are barren are fittest to supply perpetuity of generations, by perpetuity of noble acts; but contrariwise, that they that leave posterity are the more interested in the

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care of future times; that as well their progeny, as their people may participate of their merit.

YOUR Majesty is a great master in justice and judicature, and it were pity the fruit of that your virtue, should not be transmitted to the ages to come. Your Majesty also reigneth in learned times, the more (no doubt) in regard of your own perfection in learning, and your patronage thereof. And it hath been the mishap of works of this nature, that the less learned time hath (sometimes) wrought upon the more learned, which now will not be so. As for my self, the law was my profession, to which I am a debtor: some little helps I have of other arts, which may give form to matter: and I have now (by God's merciful chastisement, and by his special providence,) time and leisure to put my talent, or half talent, or what it is, to such exchanges as may perhaps exceed the interest of an active life. Therefore, as in the beginning of my troubles, I made offer to your Majesty to take pains in the story of *England*, and in compiling a method and digest of your laws, so have I performed the first (which rested but upon my self,) in some part; and I do in all humbleness renew the offer of this later (which will require help and assistance) to your Majesty, if it shall stand with your good pleasure to employ my service therein.

THE

THE
ELEMENTS
 OF THE
COMMON LAWS
 OF
ENGLAND.

CONTAINING

- I. A Collection of some principal Rules and Maxims of the COMMON LAW; with their Latitude and Extent.
 - II. The USE of the COMMON LAW, for preservation of our Persons, Goods, and good Names; according to the Laws and Customs of this Land.
-

TO HER

Sacred MAJESTY.

H E I Do here most humbly present and dedicate to your sacred Majesty a sheaf and cluster of fruit of the good and favourable season, which by the influence, of your happy government we enjoy; for if it be true that *silent leges inter arma*, it is also as true, that your Majesty

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is in a double respect the life of our Laws; once, because without your authority they are but *litera mortua*; and again because you are the life of our peace, without which laws are put to silence, and as the vital spirits do not only maintain and move the body, but also contend to perfect and renew it; so your sacred Majesty, who is *anima legis*, doth not only give unto your laws force and vigour but also hath been careful of their amendment and reforming; wherein your Majesty's proceeding may be compared, as in that part of your government (for if your government be considered in all the parts, it is incomparable) with the former doings of the most excellent Princes that ever have reigned, whose study altogether hath been always to adorn and honour times of peace, with the amendment of the policy of their laws. Of this proceeding in *Augustus Cæsar* the testimony yet remains.

*Pace datâ terris, animum ad civilia vertit
Iura suum; legesq; tulit justissimus auctor.*

Hence was collected the difference between *gesta in armis*, and *acta in toga*, whereof he disputeth thus:

ECQUID est quod tam proprie dici possit actum ejus, qui togatus in republica cum potestate imperioque versatus sit, quam lex? quare acta Gracchi: leges Semproniae proferantur: quare Syllae, Corneliae: quid? Cn. Pom. tertius consulatus, in quibus actis consistit? nempe in legibus: a Cæsare ipso si quæreres quidnam egisset in urbe, & in toga, leges multas se responderet & præclaras tulisse.

THE same desire long after did spring in the Emperor *Justinian*, being rightly called *Ultimus Imperatorum Romanorum*, who having peace in the heart of his empire, and making his Wars prosperously in the remote places of his dominions by his lieutenants, chose it for a monument and honour

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hour of his government, to revise the *Roman* laws from infinite volumes and much repugnancy, into one competent and uniform corps of law; of which matter himself doth speak gloriously, and yet aptly, calling of it, *proprium & sanctissimum templum justitiae consecratum*: a work of great excellency indeed, as may well appear in that *France, Italy, and Spain*, which have long since shaken off the yoke of the *Roman Empire*, do yet nevertheless continue to use the policy of that law: but more excellent had the work been, save that the more ignorant and obscure time undertook to correct the more learned and flourishing time. To conclude with the domestick example of one of your Majesty's royal Ancestors: King *Edward I.* your Majesty's famous progenitor, and the principal law-giver of our nation, after he had in his younger years given himself satisfaction in the glory of arms, by the enterprise of the *Holy Land*, and having inward peace, (otherwise than for the invasions which himself made upon *Wales* and *Scotland*, parts far distant from the centre of the realm;) he bent himself to endow his state with sundry notable and fundamental laws, upon which the government hath ever since principally rested: of this example, and others the like, two reasons may be given; the one, because that Kings, which either by the moderation of their natures, or the maturity of their years and judgment, do temper their magnanimity with justice, do wisely consider and conceive of the exploits of ambitious wars, as actions rather greater than good; and so distasted with that course of winning honour, they convert their minds rather to do somewhat for the better uniting of human society, than for the dissolving or disturbing of the same. Another reason is, because times of peace for the most part drawing with them abundance of wealth, and finesse of cunning, do draw also in further consequence multitude of suits and controversies

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troveries, and abuses of law by evasions and devices; which inconveniences in such time growing more general, do more instantly solicit for the amendment of laws to restrain and repress them.

YOUR Majesty's reign having been blessed from the highest with inward peace, and falling into an age, wherein if science be increased, conscience is rather decayed; and if mens wits be great their wills be greater; and wherein also laws are multiplied in number, and slackened in vigour and execution; it was not possible but that not only suits in law should multiply and increase, (whereof a great part are always unjust) but also that all the indirect courses and practises to abuse law and justice should have been much attempted and put in ure, which no doubt had bred greater enormities, had they not by the royal policy of your Majesty, by the censure and foresight of your Council-table and Star-chamber, and by the gravity and integrity of your Benches, been repressed and restrained; for it may be truly observed, that as concerning frauds in contracts, bargains, and assurances, and abuses of laws by delays, covins, vexations, and corruptions in informers, jurors, ministers of justice, and the like, there have been sundry excellent statutes made in your Majesty's time, more in number, and more politick in provision, than in any your Majesty's predecessor's times.

BUT I am an unworthy witness to your Majesty of an higher intention and project, both by that which was published by your chancellor in full parliament from your royal mouth, in the five and thirtieth of your happy reign; and much more by that which I have been since vouchsafed to understand from your Majesty, imparting a purpose for these many years infused into your Majesty's Breast, to enter into a general amendment of the states of your laws and to reduce them to more brevity and certainty, that the

great

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great hollowness and unsafety in assurances of lands and Goods may be strengthened, the swerving penalties that lie upon many subjects removed, the execution of many profitable laws revived, the judge better directed in his sentence, the counsellor better warranted in his council, the student eased in his reading, the contentious suitor that seeketh but vexation disarmed, and the honest suitor that seeketh but to obtain his right relieved; which purpose and intention, as it did strike me with great admiration when I heard it, so it might be acknowledged to be one of the most chosen works, and of the highest merit and beneficence towards the subject, that ever entered into the mind of any king; greater than we can imagine, because the imperfections and dangers of the laws are covered under the clemency and excellent temper of your Majesty's government. And though there be rare precedents of it in government, as it cometh to pass in things so excellent, there being no precedent full in view but of *Justinian*, yet I must say as *Cicero* said to *Cesar*, *Nihil vulgare te dignum videri potest*; and as it is no doubt a precious seed sown in your Majesty's heart by the hand of God's divine Majesty, so I hope, in the maturity of your Majesty's own time, it will come up and bear fruit. But to return thence whither I have been carried; observing in your Majesty, upon notable proofs and grounds, this disposition in general of a prudent and royal regard to the amendment of your laws, and having by my private labour and travel collected many of the grounds of the common laws, the better to establish and settle a certain sense of law, which doth now too much waver in uncertainty, I conceived the nature of the subject, besides my particular obligation, was such, as I ought not to dedicate the same to any other than to your sacred Majesty; both because though the collection be mine, yet the laws are yours;

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yours; and because it is your Majesty's reign that hath been as a goodly seasonable spring-wheather to the advancing of all excellent arts of peace. And so concluding with a prayer answerable to the present argument, which is, that God will continue your Majesty's reign in a happy and renowned peace, and that he will guide both your policy and arms to purchase the continuance of it with surety and honour, I most humbly crave pardon, and commend your Majesty to the divine preservation.

Your sacred MAJESTY's
most humble and obedient
subject and servant,

FRANCIS BACON.

T H E
P R E F A C E.

45 + 23

I Hold every man a debtor to his profession; from the which as men of course do seek to receive countenance and profit, so ought they of duty to endeavour themselves by way of amends to be a help and ornament thereunto. This is performed in some degree by the honest and liberal practice of a profession, when men shall carry a respect not to descend into any course that is corrupt and unworthy thereof, and preserve

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serve themselves free from the abuses wherewith
the same profession is noted to be infected: but
much more is this performed if a man be able
to visit and strengthen the roots and foun-
dation of the science it self; thereby not only
gracing it in reputation and dignity, but also am-
plifying it in perfection and substance. Having
therefore from the beginning come to the study
of the laws of this realm, with a desire no less
(if I could attain unto it) that the same laws
should be the better for my industry, than that
my self should be the better for the knowledge of
them: I do not find that by mine own travel,
without the help of authority, I can in any kind
confer so profitable an addition unto that science,
as by collecting the rules and grounds dispersed
throughout the body of the same laws; for here-
by no small light will be given in new cases,
wherein the authorities do square and vary, to
confirm the law, and to make it received one
way, and in cases wherein the law is cleared by
authority; yet nevertheless to see more profound-
ly into the reason of such judgments and ruled
cases, and thereby to make more use of them for
the decision of other cases more doubtful; so that
the uncertainty of law, which is the principal and
most just challenge that is made to the laws of
our nation at this time, will, by this new strength-
ened to the foundation, be somewhat the more
settled and corrected: neither will the use hereof
be only in deciding of doubts, and helping sound-
ness of judgment, but further in gracing of ar-
gument, in correcting unprofitable subtlety, and
reducing the same to a more sound and substan-
tial sense of law, in reclaiming vulgar errors, and
generally the amendment in some measure of the
very nature and complexion of the whole law;
and therefore the conclusions of reasons of this
kind are worthily and aptly called by a great
villian *legum leges*, laws of laws, for that many

placita

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placita legum, that is, particular and positive learnings of laws do easily decline from a good temper of justice, if they be not rectified and governed by such rules.

Now for the manner of setting down of them, I have in all points, to the best of my understanding and foresight, applied my self not to that which might seem most for the ostentation of mine one wit or knowledge, but to that which may yield most use and profit to the students and professors of our laws.

AND therefore; whereas these rules are some of them ordinary and vulgar, that now serve but for grounds and plain songs to the more shallow and impertinent sort of arguments; other of them are gathered and extracted out of the harmony and congruity of cases, and are such as the wisest and deepest sort of lawyers have in judgment and use, though they be not able many times to express and set them down.

FOR the former sort, which a man that should rather write to raise an high opinion of himself, than to instruct others, would have omitted, as trite and within every Man's compass; yet nevertheless I have not affected to neglect them, but have chosen out of them such as I thought good: I have reduced them to a true application, limiting and defining their bounds, that they may not be read upon at large, but restrained to a point of difference: for as both in the law and other sciences, the handling of questions by common-place without aim or application is the weakest; so yet nevertheless many common principles and generalities are not to be contemned, if they be well derived and deduced into particulars, and their limits and exclusions duly assigned; for there be two contrary faults and extremities in the debating and sifting out of the law, which may best noted in two several manner of arguments: Some argue upon general grounds, and come no

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near the point in question; others, without laying any foundation of a ground or difference, do loosely put cases, which though they go near the point, yet being put so scattered, prove not, but rather serve to make the law appear more doubtful, than to make it more plain.

SECONDLY, whereas some of these rules have a concurrence with the civil *Roman* law, and some others a diversity, and many times an opposition, such grounds which are common to our law and theirs I have not affected to disguise into other words than the civilians use, to the end they might seem invented by me, and not borrowed or translated from them: No, but I took hold of it as a matter of greater authority and majesty to see and consider the concordance between the laws penn'd, and as it were dictated *verbatim* by the same reason: on the other side, the diversities between the civil *Roman* rules of law and ours, happening either when there is such an indifferency of reason so equally ballanced as the one law embraceth one course, and the other the contrary, and both just, after either is once positive and certain, or where the laws vary in regard of accommadiating the law to the different considerations of estate, I have not omitted to set down.

THIRDLY, whereas I could have digested these rules into a certain method or order, which I know would have been more admired, as that which would have made every particular rule through coherence and relation unto other rules seem more cunting and deep, yet I have avoided so to do, because this delivering of knowledge in distinct and disjoined aphorisms, doth leave the wit of man more free to turn and toss, and make use of that which is so delivered to more several purposes and applications; for we see that all the antient wisdom and science was wont to be delivered in that form, as may be seen by the parables

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parables of *Solomon*, and by the aphorisms of *Hippocrates*, and the moral verses of *Theognis* and *Phocylides*, but chiefly the president of the civil law, which hath taken the same course with their rules, did confirm me in my opinion.

FOURTHLY, whereas I know very well it would have been more plausible and more current, if the rules, with the expositions of them, had been set down either in *Latin* or in *English*, that the harshness of the language might not have disgraced the matter, and that civilians, statesmen, scholars, and other sensible men might not have been barred from them; yet I have forsaken that grace and ornament of them, and only taken this course: the rules themselves I have put in *Latin*, not purified further than the propriety of the terms of the law would permit; which language I chose as the briefest to contrive the rules compendiously, the aptest for memory, and of the greatest authority and majesty to be avouched and alledged in argument: and for the expositions and distinctions, I have retained the peculiar language of our law, because it should not be singular among the books of the same science, and because it is most familiar to the students and professors thereof, and because that it is most significant to express conceits of law; and to conclude, it is a language wherein a man shall not be inticed to hunt after words, but matter; and for the excluding of any other than professed lawyers, it was better manners to exclude them by the strangeness of the language than by the obscurity of the conceit; which is as though it had been written in no private and retired language, yet by those that are not lawyers, would for the most part not have been understood, or, which is worse, mistaken.

FIFTHLY, whereas I might have made more flourish and ostentation of reading, to have vouch'd the authorities, and sometimes to have enforced or

noted upon them, yet I have abstained from that also; and the reason is, because I judged it a matter undue and preposterous to prove rules and maxims, wherein I had the example of Mr. *Littleton*, and Mr. *Fitzherbert*, whose writings are the institutions of the laws of *England*: whereof the one forbeareth to vouch any authority altogether; the other never recitateth a book, but when he thinketh the case so weak of credit in it self, as it needs a surety; and these two I did far more esteem than Mr. *Perkins* or Mr. *Stamford* that have done the contrary: well will it appear to those that are learned in the laws, that many of the cases are judged cases, either within the books or of fresh report, and most of them fortified by judged cases, and similitude of reason: though in some few cases I did intend expressly to weigh down the authority by evidence of reason, and therein rather to correct the law, than either to sooth a received error, or by unprofitable subtlety which corrupteth the sense of law, to reconcile contrarieties. For these reasons I resolved not to derogate from the authority of the rules, by vouching of any of the authority of the cases, though in mine one copy I had them quoted: for although the meanness of mine own Person may now at first extenuate the authority of this collection, and that every man is adventurous to controul; yet surely according to *Ganduel's* reason, if it be of weight, time will settle and authorise it; if it be light and weak, time will reprove it: so that to conclude, you have here a work without any glory of affected novelty, or of method, or of language, or of quotations and authorities, dedicated only to use, and submitted only to the censure of the learned, and chiefly of time.

LASTLY, there is one point above all the rest I account the most material for making these rea-

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sions indeed profitable and instructing; which is, that they be not set down alone like short dark oracles, which every Man will be content still to allow to be true, but in the mean time they give little light or direction; but I have attended them, a matter not practised, no not in the Civil law to any purpose; and for want whereof indeed, the rules are but as proverbs, and many times plain fallacies, with a clear and perspicuous exposition, breaking them into cases, and opening them with distinctions, and sometimes shewing the reasons above whereupon they depend, and the affinity they have with other rules. And tho' I have thus, with as good discretion and foresight as I could, ordered this work, and as I might say, without all colours or shews, husbanded it best to profit; yet nevertheless not wholly trusting to mine own judgment, having collected three hundred of them, I thought good, before I brought them all into form, to publish some few, that by the taste of other mens opinions, in this first, I might receive either approbation in mine own course, or better advice for the altering of the other which remain; for it is great reason that that, which is intended to the profit of others, should be guided by the conceits of others.

THE

THE
MAXIMS
OF THE
LAW.

In jure non remota causa sed proxima spectatur.

IT were infinite for the law to judge the causes of causes, and their impulsions one of another; therefore it contenteth it self with the immediate cause, and judgeth of acts by that, without looking to any farther degree.

As if an annuity be granted *pro consilio impenso* 6 H. 8. D.
& impendendo, and the grantee commit treason whereby he is imprisoned, so that the grantor cannot have access unto him for his counsel, yet nevertheless the annuity is not determined by this *non feasance*; yet it was the grantee's act and default to commit the treason whereby the imprisonment grew: but the law looketh not so far, but excuseth him, because the not giving counsel was compulsory, and not voluntary, in regard of the imprisonment.

So if a parson make a lease, and be deprived or resign, the successors shall avoid the lease; and yet the cause of deprivation, and more strongly of a resignation, moved from the Party himself: but the law regardeth not that, because the Ad-

Litt. cap.
2 H. 4. 3.
26 H. 8. 2.

MAXIMS OF THE LAW.

mission of the new incumbent is the act of the ordinary.

s H. 7 25.

So if I be seised of an advowson in gross, and an usurpation be had against me, and at the next avoidance I usurp arere, I shall be remitted, and yet the presentation, which is the act remote, is mine own act; but the admission of my clerk, whereby the inheritance is reduced to me, is the act of the ordinary.

So if I covenant with *J. S.* a Stranger, in consideration of natural love to my son, to stand seised to the use of the said *J. S.* to the intent he shall infeoff my Son; by this no use ariseth to *J. S.* because the law doth respect that there is no immediate consideration between me and *J. S.*

So if I be bound to enter into a statute before the mayor of the staple at such a day, for the security of a hundred pound, and the obligee, before the day, accept of me a lease of an house in satisfaction; this is no plea in debt upon my obligation, and yet the end of that statute was but security of money: but because the entring into this statute it self, which is the immediate act whereunto I am bound, is a corporal act which lieth not in satisfaction, therefore the law taketh no consideration that the remote intent was for money.

So if I make a * feoffment in fee, upon condition that the feoffee shall infeoff over, and the feossee be desseised, and a descent cast, and then the feoffee bind himself in a statute, which statute is discharged before the recovery of the land, this is no breach of the condition, because the land was never liable to the statute, and the possibility that it should be liable upon the recovery, the law doth not respect.

* M. 40 & 41 El. Julius Winnington's Case, ore report per le tresreverend Judge, le Sur Coke, lib. 2.

So if I enfeoff two, upon condition to enfeoff, and one of them take a Wife, the condition is not broken, and yet there is a remote possibility that the jointenant may die, and then the feme is entitled to dower.

So if a man purchase land in fee-simple, and die without issue; in the first degree the law respecteth dignity of sex and not proximity; and therefore the remote heir on the part of the father, shall have it before the near heir on the part of the mother: but in any degree paramount the first the law respecteth not, and therefore the near heir by the grandmother, on the part of the father, shall have it before the remote heir of the grandfather on the part of the father.

THIS rule faileth in covenous acts, which though they be conveyed through many degrees and reaches, yet the law taketh heed to the corrupt beginning, and counteth all as one entire act.

As if a feoffment be made of lands held by Knights-service to J. S. upon condition that within a certain time he shall enfeoff J. D. which feoffment to J. D. shall be to the use of the wife of the first feoffor for her Jointure, &c. this feoffment is within the Statute of 32 H. VIII. *nam dolus circuitu non purgatur.*

IN like manner this rule holdeth not in criminal acts, except they have a full interruption; because when the intention is matter of substance, and that which the law doth principally behold, there the first motive will be principally regarded, and not the last impulsion. As if J. S. of malice prepensed discharge a pistol at J. D. and misseth him, whereupon he throws down his pistol and flies, and J. D. pursueth him to kill him, whereupon he turneth and killeth J. D. with a dagger; if the law should consider the last impulsive cause, it should say that it was in his own defence; but the law is otherwise, for it is but a pursuance and execution of the first murtherous intent.

44 Ed. 3.

BUT if *J. S.* had fallen down his dagger drawn, and *J. D.* had fallen by haste upon his dagger, there *J. D.* had been *felo de se*, and *J. S.* shall go quit.

ALSO you may not confound the act with the execution of the act; nor the entire act with the last part, or the consummation of the act.

Lit. cap. de disc.

FOR if a disseisor enter into religion, the immediate cause is from the party, though the descent is cast in law; but the law doth but execute the act which the party procureth, and therefore the descent shall not bind, & *sic è converso*.

21 Eliz.

24 H. 8. fo. 4.
Dy.

IF a lease for years be made rendring a rent, and the lessee make a feoffment of part, and the lessor enter, the immediate cause is from the law in respect of the forfeiture, though the entry be the act of the party: but that is but the pursuance and putting in execution of the title which the law giveth; and therefore the rent or condition shall be appointed.

So in the binding of a right by a descent, you are to consider the whole time from the disseisin to the descent cast; and if at all times the person be not privileged, the descent binds.

9 H. 7. 24.
3 & 4 P. & M.
Dy. 143.

AND therefore if a feme covert be disseised, and the Baron dieth, and she taketh a new husband, and then the descent is cast: or if a man, that is not *infra 4 Maria*, be disseised, and he return into *England*, and go over sea again, and then a descent is cast, this descent bindeth because of the *interim* when the persons might have entered; and the law respecteth not the state of the person at the last time of the descent cast, but a continuance from the very disseised to the descent.

So if baron and feme be, and they join in a feoffment of the wife's land, rendring a rent, and the Baron die, and the feme take a new husband before

before any rent day, and he accepteth the rent, the feoffment is affirmed for ever.

Reg. 2. *Non potest adduci exceptio ejusdem rei, cuius petitur dissolutio.*

IT were impertinent and contrary in it self, for the law to allow of a plea in bar of such matter as is to be defeated by the same suit; for it is included: otherwise a man should never come to the end and effect of his suit, but be cut off in the way.

AND therefore if tenant in tail of a manor, whereunto a villain is regardant, discontinue and die, and the right of the entail descend to the villain himself, who brings a *formedon*, and the discontinuue pleadeth villainage, this is no plea, because the devesting of the manor, which is the intention of the suit, doth include this plea, because it determineth the villainage.

So if tenant in antient demesne be disseised by the lord, whereby the seigniory is suspended, and the disseisee bring his assize in the court of the Lord, frank fee is no plea, because the suit is brought to undo the disseisee, and so to revive the seigniory in antient demesne.

So if a man be attainted and executed, and the heir bring a writ of error upon the attainder, and the corruption of blood by the same attainder be pleaded to interrupt his conveying in the same writ of error; this is no plea, for then he were without remedy ever to reverse the attainder.

So if tenant in tail discontinue for life, rendering a rent, and the issue brings a *formedon*, and the warranty of his ancestor with assets be pleaded against him, and the assets is laid to be no other but his reversion with the rent; this is no plea, because the *formedon* which is brought to undo this discontinuance doth inclusively undo

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this new reversion in fee with the rent thereunto annexed.

BUT whether this rule may take place where the matter of plea is not to be avoided in the same suit but in another suit, is doubtful; and I rather take the law to be that this rule doth extend to such cases, for otherwise the party were at a mischief, in respect the exceptions and bars might be pleaded cross either of them in the contrary suit, and so the party altogether prevented and intercepted to come by his right.

So if a man be attainted by two several attainders, and there is error in them both, there is no reason but that there should be a remedy open for the heir to reverse those attainders being erroneous, as well if they be twenty as one.

AND therefore if in a writ of error brought by the heir of one of them, the attainer shall be a plea peremptorily; and so again if in error brought of that other, the former should be a plea, these were to exclude him utterly of his right; and therefore it should be a good replication to say that he hath a writ of error depending of that also, and so the court shall proceed; but no judgment shall be given till both pleas be discussed; and if either plea be found without error, there shall be no reversal either of the one or of the other; and if he discontinue either writ, then it shall be no longer a plea; and so of several outlawries in a personal action.

AND this seemeth to me more reasonable, than that generally an outlawry or an attainer should be no plea in a writ of error brought upon a diverse outlawry or an attainer, as 7 H. IV. and 7 H. VI. seem to hold; for that is a remedy too large for the mischief; for there is no reason but if any of the outlawries or attainders be indeed without error, but it should be a peremptory plea to the person in a writ of error as well as in any other action.

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BUT if a man levy a fine sur conuance de droit come ceo que il ad de son done, and suffer a recovery of the same lands, and there be error in them both, he cannot bring error first of the fine, because by the recovery his title of error is discharged and released in law inclusive, but he must begin with the error upon the recovery (which he may do, because a fine executed barreth no titles that accrue *de prisne temps* after the fine levied,) and so restore himself to his title of error upon the fine: but so it is not in the former case of the attainer; for a writ of error to a former attainer is not given away by a second, except it be by express words of an act of parliament, but only it remaineth a plea to his person while he liveth, and to the conveyance of his heir after his death.

BUT if a man levy a fine where he hath nothing in the land, which inureth by way of conclusion only, and is executory against all purchases and new titles which shall grow to the conuisee afterwards, and he purchase the land, and suffer a recovery to the conuisee, and in both fine and recovery, there is error; this fine is *Janus bifrons*, and will look forward, and bar him of his writ of error brought of the recovery; and therefore it will come to the reason of the first case of the attainer, that he must reply that he hath a writ also depending of the same fine, and so demand judgment.

To return to our first purpose, like law it is if tenant in tail of two acres make two several discontinuances to several persons for life, rendering a rent, and bringeth a *formedon* of both, and in the *formedon* brought of white acre the reversion and rent reserved upon black acre is pleaded, and so contrary. I take it to be a good replication, that he hath a *formedon* also upon that depending, whereunto the tenant hath pleaded the descent of the reversion of white acre, and so neither

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neither shall be a bar; and yet there is no doubt but if in a *formedon* the warranty of tenant in tail with assets be pleaded, it is no replication for the issue to say, that a *præcipe* dependeth brought by *I. S.* to evict the assets.

But the former case standeth upon the particular reason before mentioned.

Reg. 3. *Verba fortius accipiuntur contra proferentem.*

THIS rule, that a man's deeds and his word shall be taken strongest against himself, though it be one of the most common grounds of the law, it is notwithstanding a rule drawn out of the depth of reason; for first it is a school-master of wisdom and diligence in making men watchful in their own business; next it is author of much quiet and certainty, and that in two sorts first, because it favoureth acts and conveyance executed, taking them still beneficially for the grantees and possessors: and secondly, because it makes an end of many questions and doubts about construction of words; for if the labour were only to pick out the intention of the parties every judge would have a several sense; whereas this rule doth give them a sway to take the law more certainly one way.

But this rule, as all other which are very general, is but a sound in the air, and cometh sometimes to help and make up other reasons without any great instruction or direction; except it be duly conceived in point of difference where it taketh place, and where not; and first we will examine it in grants, and then in pleadings.

THE force of this rule is in three things, in ambiguity of words, in implication of matter, and deducing or qualifying the exposition of such grants as were against the Law, if they were taken according to their words.

AND therefore if *I. S.* submit himself to arbitrement of all actions and suits between him and

D. and I. N. it rests ambiguous whether the mission shall be intended collective or joint actions only, or distribute of several actions also; because the words shall be taken strongest against I. S. that speaks them, it shall be understood of both; for if I. S. had submitted himself to arbitrement of all actions and suits which hath now depending, except it be such as are between him and I. D. and I. N. now it shall be understood collective only of joint actions, because in the other case at large, construction was hardest against him that speaks, and in this case strict construction is hardest.

So if I grant ten pounds rent to baron and feme, and if the baron die, that the feme shall have three pounds rent, because these words rest ambiguous whether I intend three pounds by way increase, or three pounds by way of restraint and abatement of the former rent of ten pounds, shall be taken strongest against me that am the grantor, that it is three pounds addition to the ten: but if I had let land to baron and feme for three lives, reserving ten pounds *per annum*, and if the baron die reserving three pounds, this shall be taken contrary to the former case, to obridge my rent only to three pounds.

So if I demise *omnes boscos meos in villa de Dale* ^{14 H. 8.} for years, this passeth the foil; but if I demise ^{21 H. 8. Dr. 19.} all my lands in *Dale exceptis boscis*, this extendeth to the trees only, and not to the foil.

So if I sow my lands with corn, and let it for years, the corn passeth to my lessee, if I except not; but if I make a lease for life to I. S. upon condition that upon request he shall make me a lease for years, and I. S. soweth his ground, and when I make request, I. S. may well make me a lease excepting his corn, and not break the condition.

So if I have free warren in mine own hand, ^{8 H. 7.} and let my land for life, not mentioning the war- ^{32 H. 6.} ren,

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ren, yet the lessee by implication shall have the warren discharged and extract during his lease: but if I let the land *una cum libera warrenna*, excepting white acre, there the warren is not by implication reserved unto me either to be enjoyed or extinguished; but the lessee shall have warren against me in white acre.

29 Aff. pl. 10.

So if *J. S.* hold of me by fealty and rent only, and I grant the rent, not speaking of the fealty, yet the fealty by implication shall pass, because my grant shall be taken strongly as of a rent-service, and not of a rent-seck.

44 Ed. 3. 19.

OTHERWISE had it been if the seigniory had been by homage, fealty, and rent, because of the dignity of the service, which could not have passed by intendment by the grant of the rent: but if I be seised of the manor of Dale in fee, whereof *J. S.* holds by fealty and rent, and I grant the manor, excepting the rent, the fealty shall pass to the grantees, and *J. S.* shall have but a rent-seck.

26 Aff. pl. 66.

So in grants against the law, if I give land to *J. S.* and his heirs males, this is a good fee-simple, which is a larger estate than the words seem to intend, and the word *males* is void. But if I make a gift entail, reserving a rent to me and the heirs of my body, the words of my body are not void, and to leave it a rent in fee-simple; but the word *heirs* and all are void, and leaves but a rent for life; except that you will say, it is but a limitation to any my heir in fee-simple which shall be heir of my body; for it cannot be a rent entail by reservation.

BUT if I give land with my daughter in frank marriage, the remainder to *J. S.* and his heirs, this grant cannot be good in all the parts, according to the words: for it is incident to the nature of a gift in frank marriage, that the donee hold it of the donor; and therefore my deed shall

hall be taken so strongly against myself, * that rather than the remainder shall be void, the frank marriage, though it be first placed in the deed, shall be void as a frank marriage.

BUT if I give land in frank marriage, reserving to me and my heirs ten pounds rent, now the frank marriage stands good, and the reservation is void, because it is a limitation of a benefit to myself, and not to a stranger.

So if I let white acre, black acre, and green acre to *J. S.* excepting white acre, this exception is void, because it is repugnant; but if I let the three acres aforesaid, rendring twenty shillings rent, viz. for white acre ten shillings, and for black acre ten shillings, I shall not distrain at all on green acre, but that shall be discharged of my rent.

So If I grant a rent to *J. S.* and his heirs out of my manor of *Dale*, & obligo manerium & omnia bona & catalla mea super manerium praedictum existentia ad distingendum per balivum domini regis: this limitation of the distress to the King's bailiff is void, and it is good to give a power of distress to *J. S.* the grantee and his bailiffs.

BUT if I give land in tail *tenend' de capitalibus*² Ed. 4; 5. *dominis per redditum viginti solidorum & fidelitatem:* this limitation of tenure to the lord is void; and it shall not be good, as in the other case, to make a reservation of twenty shillings good unto myself; but it shall be utterly void as if no reservation at all had been made: and if the truth be that I that am the donor hold of the lord paramount by ten shillings only, then there shall be ten shillings only reserved upon the gift entail as for ovelty.

* Quere car le ley semble dée le contrary, entant que in un grant quant lun part del fait ne poit estroier ove lauter le darr: terra void, auerment in un devise & accordant fuit lopin: de Sur Anderson & Owen Just. contra Walmsley Just. P. 40. Eliz. in le case de Countesse de Warwick & Sur Berkley in com. banco, & H. 6. 22. 26 Ass. pl. 66. 46 Ed. 3. 18.

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21 Ed. 3. 49.
31 &c 32 H. 8.
Dyer 46.
Plow. fo. 37.
25 H. 6. 34.

So if I give land to *I. S.* and the heirs of his body, and for default of such issue *quod tenementum prædictum revertatur ad I. N.* yet these words of reservation will carry a remainder to a stranger. But if I let white acre to *I. S.* excepting ten shillings rent, these words of exception to mine own benefit shall never inure to words of reservation.

BUT now it is to be noted, that this rule is the last to be resorted to, and is never to be relied upon but where all other rules of exposition of words fail; and if any other come in place this giveth place. And that is a point worthy to be observed generally in the rules of the law, that when they encounter and cross one another in any case, it be understood which the law holdeth worthier, and to be preferred; and it is in this particular very notable to consider, that this being a rule of some strictness and rigor, doth not as it were its office, but in absence of other rules which are of more equity and humanity; which rules you shall afterwards find set down with their expositions and limitations.

BUT now to give a taste of them to this present purpose, it is a rule that general words shall never be stretched too far in intendment, which the Civilians utter thus; *Verba generalia restringuntur ad habilitatem personæ, vel ad aptitudinem rei.*

14 Aff. pl. 25.

THEREFORE if a man grant to another common *intra metas & bündas villa de Dale*, and part of the vill in his several, and part his waste and common; the grantees shall not have common in the several; and yet this is the Strongest exposition against the grantor.

Lit. cap. cond. So it is a rule, *Verba ita sunt intelligenda, res magis valeat quam pereat*: and therefore if I give land to *I. S.* and his heirs, *reddend. quinq; libras annuatim* to *I. D.* and his heirs, this implies a condition to me that am the grantor; y

there were a stronger exposition against me, to say the limitaion should be void, and the seoffment absolute.

So it is a rule, that the law will not intend a wrong, which the Civilians utter thus; *Ea est accipienda interpretatio, quæ vitio caret.* And therefore if the executor of I. S. grant *omnia bona & atalla sua*, the goods which they have as executors will not pass, because *non constat* whether it may be a devastation, and so a wrong; and yet against the trespasser that taketh them out of their hands, they shall declare *quod bona sua cepit*.

So it is a rule, that words are so to be understood that they work somewhat, and be not idle and frivolous: *verba aliquid operari debent, verba cum effectu sunt accipienda.* And therefore if I buy and sell you the fourth part of my manor of Dale, and say not in how many parts to be divided, this shall be construed four parts of five, and not of six nor seven, &c. because that it is the strongest against me; but on the other side, it shall not be intended four parts of four parts, or the whole of four quarters; and yet that were strongest of all, but then the words were idle and of none effect.

So it is a rule, *Divinatio non interpretatio est*, ; H. 6. 20. *quæ omnino recedit a litera*: and therefore if I have a fee-farm-rent issuing out of white acre of ten shillings, and I reciting the same reservation do grant to I. S. the rent of five shillings *percipienda de reddit' prædict' & de omnibus terris & tenementis meis in Dale*, with a clause of distress, although there be atturment, yet nothing passeth out of my former rent; and yet that were strongest against me to have it a double rent, or grant of part of that rent with an enlargement of a distress in the other land, but for that it is against the words, because *copulatio verborum indicat acceptationem in eodem sensu*, and the word *de* (Anglice out of) may be taken in two senses, that

that is, either as a greater sum out of a less, or as a charge out of land, or other principal interest ; and that the coupling of it with lands and tenements, *viz.* I reciting that I am seised of such a rent of ten Shillings, do grant five shillings *percipiend' de eodem reddit'*, it is good enough without atturnement ; because *percipiend' de &c.* may well be taken for *parcella de &c.* without violence to the words ; but if it had been *de reddit' praedit'*, although *I. S.* be the person that payeth me the foresaid rent of ten shillings, yet it is void ; and so it is of all other rules of exposition of grants, when they meet in opposition with this rule they are preferred.

Now, to examine this rule in pleadings as we have done in grants, you shall find that in all imperfections of pleadings, whether it be in ambiguity of words and double intendments, or want of certainty and averments, the plea shall be strictly and strongly against him that pleads.

FOR ambiguity of words, if in a writ of entry upon disseisin, the tenant pleads jointenancy with *I. S.* of the gift and feoffment of *I. D.* judgment *de briefe*, the demandant saith that long time before *I. D.* any thing had, the demandant himself was seised in fee *quousque praedit' I. D. super possessionem ejus intravit*, and made a joint feoffment, whereupon he the demandant re-entered, and so was seised until by the defendant alone he was disseised ; this is no plea, because the word *intravit* may be understood either of a lawful entry, or of a tortious ; and the hardest against him shall be taken, which is, that it was a lawful entry ; therefore he should have alledged precisely that *I. D. disseisivit.*

^{3 Ed. 6 Dy. 66.} So upon ambiguities that grow by reference, if an action of debt be brought against *I. N.* and *I. P.* sheriffs of *London*, upon an escape, and the plaintiff doth declare upon an execution by force of a recovery in the prison of *Ludgate sub custodia*

I. S.

I. S. & I. D. then sheriffs in 1 K. H. VIII. and that he so continued *sub custodia I. B. & I. G.* in 2 K. H. VIII. and so continued *sub custodia I. N. & I. L.* in 3 K. H. VIII. and then was suffered to escape: *I. N.* and *I. L.* plead that before the escape supposed, at such a day *anno superius in narratione specificato* the said *I. D.* and *I. S.* *ad tunc vicecomites* suffered him to escape; this is no good plea, because there be three years specified in the declaration, and it shall be hardest taken that it was 1 or 3 H. VIII. when they were out of office; and yet it is nearly induced by the *ad tunc vicecomites*, which should leave the intendment to be of that year in which the declaration supposeth that they were sheriffs; but that sufficeth not, but the year must be alleged in fact, for it may be mislaid by the plaintiff, and therefore the defendants meaning to discharge themselves by a former escape, which was not in their time, must allege it precisely.

FOR uncertainty of intendment, if a warranty ^{26 H. 8.} collateral be pleaded in bar, and the plaintiff by replication to avoid the warranty saith, that he entered upon the possession of the defendant, *non constat*, whether this entry was in the life of the ancestor or after the warranty attached; and therefore it shall be taken in hardest sense, that it was after the warranty descended, if it be not otherwise averred.

FOR impropriety of words, if a man plead that ^{38 H. 6. 12.} his ancestor died by protestation seised, and that ^{39 H. 6. 5.} *I. S.* abated, &c. this is no plea, for there cannot be an abatement, except there be a dying seised alleged in fact; and an abatement shall not be improperly taken for disseisin in pleading *car parols sont pleas.*

FOR repugnancy, if a man in avowry declare that he was seised in his demesne as of fee of white acre, and being so seised did demise the said white acre to *I. S. habendum* the moiety for

twenty-one years from the Date of the deed, the other moiety from the surrender, expiration, or determination of the estate of *I. D. qui tenet prædict' medietatem ad terminum vite sue reddend'*
 40 s. rent: this declaration is insufficient, because the seisin that he hath alleged in himself in his demesne as of fee in the whole, and the state for life of a moiety are repugnant; and it shall not be cured by taking the last which is expressed to controll the former, which is but general and formal; but the plea is naught, and yet the matter in law had been good to have intitled him to have distrained for the whole rent.

But the same restraint follows this rule in pleading that was before noted in grants: for if the case be such as falleth within another rule of pleading, this rule may not be urged.

AND therefore it is a rule that a bar is good to a common intent, though not to every intent. As if a debt be brought against five executors, and three of them make default, and two appear and plead in bar a recovery had against them two of 300*l.* and nothing in their hands over and above that sum. If this bar should be taken strongest against them, it should be intended that they might have abated the first suit, because the other three were not named, and so the recovery not duly had against them; but because of this other rule the bar is good: for that the more common intent will say, that they two did only administer, and so the Action well considered; rather than to imagine, that they would have lost the benefit and advantage of abating the writ.

So there is another rule, that in pleading a man shall not disclose that which is against himself: and therefore if it be matter that is to be set forth on the other side, then the plea shall not be taken in the hardest sense, but in the most bene-

⁹ Ed. 4.

⁴ Ed. 6. Plow.

beneficial, and to be left unto the contrary party to allege.

AND therefore if a man be bound in an obligation, that if the feme of the obligee do decease before the feast of St. John the Baptist, which shall be in the year of our Lord 1598. without issue of her body by her husband lawfully begotten then living, that then the bond shall be void; and in debt brought upon this obligation the defendants plead that the feme died before the said feast without issue of her body then living: if this plea should be taken strongest against the defendant, then should it be taken that the feme had issue at the time of her death, but this issue died before the feast; but that shall not be so understood, because it makes against the defendant, and it is to be brought in of the plaintiff's side, and that without traverse.

So if in a detinue brought by a feme against the executors of her husband for her reasonable part of the goods of her husband, and her demand is of a moiety, and she declares upon the custom of the realm, by which the feme is to have a moiety, if no issue be had between her and her husband, and the third part if there be issue had, and declareth that her husband dieth without issue had between them; if this count should be hardest construed against the party, it should be intended that her husband had issue by another wife, though not by her, in which case the feme is but to have the third part likewise; but that shall not be so intended, because it is matter of reply to be shewed of the other side.

AND so it is of all other rules of pleadings, these being sufficient not only for the exact expounding of these other rules, but *obiter* to shew how this rule which we handle is put by when it meets with any other rule.

^{28 H. 8. Dy.}
fol. 17.

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As for acts of parliament, verdicts, judgments, &c. which are not words of parties, in them this rule hath no place at all, neither in devises and wills upon several reasons; but more especially it is to be noted, that in evidence it hath no place, which yet seems to have some affinity with pleadings, specially when demurrer is joiner upon the evidence.

AND therefore if land be given by will by *H. C.* to his son *I. C.* and the heirs males of his body begotten; the remainder to *F. C.* and the heirs males of his body begotten; the remainder to the heirs males of the body of the devisor; the remainder to his daughter *S. C.* and the heirs of her body, with a clause of perpetuity; and the question comes upon the point of forfeiture in an assize taken by default, and evidence is given, and demurrer upon evidence, and in the evidence given to maintain the entry of the daughter upon a forfeiture, it is not set forth nor averred that the devisor had no other issue male, yet the evidence is good enough, and it shall be so intended; and the reason hereof cannot be, because a jury may take knowledge of any matters not within the evidence; and the court contrariwise cannot take knowledge of any matters not within the pleas: for it is clear that if the evidence had been altogether remote, and not proving the issue there, although the jury might find it, yet a demurrer might well be taken upon the evidence.

BUT if I take the reason of difference to be between pleadings, which are but openings of the case, and evidences which are the proofs of an issue, for pleadings being but to open the verity of the matter in fact indifferently on both parts, hath no scope and conclusion to direct the construction and intendment of them, and therefore must be certain; but in evidence and proofs the issue, which is the state of the question and conclusion,

clusion, shall incline and apply all the proofs as tending to that conclusion.

ANOTHER reason is, that pleadings must be certain, because the adverse party may know whereto to answer, or else he were at a mischief, which mischief is remedied by a demurrer; but in evidence if it be short, impertinent, or uncertain, the adverse party is at no mischief, because it is to be thought that the jury will pass against him; yet nevertheless the jury is not compellable to supply the defect of evidence out of their own knowledge, though it be in their liberty so to do; therefore the law alloweth a demurrer upon evidence also.

Reg. 4. *Quod sub certa forma concessum vel reservatum est, non trahitur ad valorem vel compensationem.*

THE law permitteth every man to part with his own interest, and to qualify his own grant as it pleaseth himself; and therefore doth not admit any allowance or recompence if the thing be not taken as it is granted.

So in all profits *a prender*, if I grant common for ten beasts, or ten loads of wood out of my copps, or ten loads of hay out of my meads, to be taken for three years; he shall not have common for thirty beasts, or thirty loads of wood or hay the third year, if he forbear for the space of two years; here the time is certain and precise.

So if the place be limited, or if I grant estovers to be spent in such a house, or stone towards the reparation of such a castle; although the grantee do burn of his fuel, and repair of his own charge, yet he can demand no allowance for that he took it not.

So if the kind be specified; as if I let my park reserving to myself all the deer and sufficient

pasture for them, if I do decay the game whereby there is no deer, I shall not have quantity of pasture answerable to the feed of so many deer as were upon the ground when I let it; but am without any remedy except I replenish the ground again with deer.

BUT it may be thought that the reason of these cases is the default and laches of the grantor, which is not so.

FOR put the case that the house where the estovers should be spent be overthrown by the act of God, as by tempest, or burnt by the enemies of the king, yet there is no recompence to be made.

AND in the strongest case where it is in default of the grantor, yet he shall make void his own grant rather than the certain form of it should be wrested to an equity or valuation.

As if I grant common *ubicunque averia mea ierint*, the commoner cannot otherwise intitle himself, except that he averr that in such grounds my beasts have gone and fed; and if I never put in any, but occupy my grounds otherwise, he is without remedy; but if I put in, and after by poverty or otherwise I desist, yet the commoner may continue; contrariwise, if the words of the grant had been *quandocunque averia mea ierint*, for there it depends continually upon the putting in of my beasts, or at least the general seasons when I put them in, not upon every hour or moment.

BUT if I grant *tertiam advocationem* to *I. S.* if he neglect to take his turn *ea vice*, he is without remedy; but if my wife be before intitled to dower, and I die, then my heir shall have two presentments, and my wife the third, and my grantee shall have the fourth; and it doth not impugn this rule at all, because the grant shall receive that construction at the first that it was intended such an avoidance as may be taken and enjoyed.

enjoyed; as if I grant *proximam advocationem* to *I. D.* and then grant *proximum advocationem* to *I. S.* this shall be intended the next to the next, which I may lawfully grant or dispose. *Quære.*

BUT if I grant *proximam advocationem* to *I. S.* and *I. N.* is incumbent, and I grant by precise words *illam advocationem, quam post mortem, resiguationem, translationem, vel deprivationem I. N.* immediate *fors contigerit*; now the grant is merely void, because I had granted that before, and it cannot be taken against the words.

Reg. 5. *Necessitas inducit privilegium quoad jura privata.*

THE law chargeth no man with default where the act is compulsory and not voluntary, and where there is not a consent and election; and therefore if either there be an impossibility for a man to do otherwise, or so great a perturbation of the judgment and reason, as in presumption of law man's nature cannot overcome, such necessity carrieth a privilege in itself. 4 Ed. 6. cond.

NECESSITY is of three sorts; necessity of conservation of life, necessity of obedience, and necessity of the act of God or of a stranger.

FIRST of conservation of life; if a man steals viands to satisfy his present hunger, this is no felony nor larceny.

So if divers be in danger of drowning by the casting away of some boat or barge, and one of them get to some plank, or on the boats side to keep himself above water, and another to save his life thrust him from it, whereby he is drowned; this is neither *se defendendo* nor by misadventure, but justifiable.

So if divers felons be in a goal, and the goal by casualty is set on fire, whereby the prisoners get forth; this is no escape, nor breaking of prison.

Cond. 13. 6.

per Brooke.

15 H. 7. 2.

per Kebble.

14 H. 7. 29.

per Resd.

4 Ed. 6. pl.

4 Ed. 6. 29.

condic.

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So upon the statute, that every merchant, that setteth his merchandize on land without satisfying the customer or agreeing for it, (which agreement is construed to be uncertainty) shall forfeit his merchandize, and it is so that by tempest a great quantity of the merchandize is cast over-board, whereby the merchant agrees with the customer by estimation, which falleth out short of the truth, yet the over-quantity is not forfeited; where note that necessity dispenseth with the direct letter of a statute law.

Lip. pl. 4. 19.
12 H. 4. 20.
14 H. 4. 30.
B. 38 H. 6. 11.
23 H. 6. 8.
79 H. 6. 50.

So if a man have right to land, and do not make his entry for terror of force, the law allows him a continual claim, which shall be as beneficial unto him as an entry; so shall a man save his default of appearance by *certain de eau*, and avoid his debt by *duresse*, whereof you shall find proper cases elsewhere.

Symf. 26.
2 Ed. 3. 160.
Cor.
Fitzh.

THE second necessity is of obedience; and therefore where baron and feme commit a felony, the feme can neither be principal nor accessory; because the law intends her to have no will, in regard of the subjection and obedience she owes to her husband.

So one reason among others why ambassadors are used to be excused of practices against the state where they reside, except it be in point of conspiracy, which is against the law of nations and society, is, because *non constat* whether they have it *in mandatis*, and then they are excused by necessity of obedience.

So if a warrant or precept come from the King to sell wood upon the ground whereof I am tenant for life or for years, I am excused in waste.

B. 42 Ed. 3. 6.
B. Wait 31.
42 Ed. 3. 6.
19 Ed. 3 per
Th. Fitz. Wait
20.
12 Ed. 3.
Fitzh. Wait
10.

THE third necessity is of the act of God, or of a stranger; as if I be particular tenant for years of a house, and it be overthrown by grand tempest, or thunder and lightning, or by sudden floods, or by invasion of enemies, or if I have belonging unto it some cottage which hath been

Ed. 3. 11.

in-

infected, whereby I can procure none to inhabit them, no workman to repair them, and so they fall down, in all these cases I am excused in waste: but of this last learning when and how the act of God and strangers do excuse, there be other particular rules.

But then it is to be noted, that necessity privilegeth only *quoad jura privata*, for in all cases if the act that should deliver a man out of the necessity be against the commonwealth, necessity excuseth not; for *privilegium non valet contra rem publicam*: and as another faith, *necessitas publica maior est quam privata*: for death is the last and farthest point of particular necessity, and the law imposeth it upon every subject, that he prefet the urgent service of his prince and country before the safety of his life: as if in danger of tempest those that are in the ship throw over other mens goods, they are not answerable; but if a man be commanded to bring ordnance or ammunition to relieve any of the King's towns that are distressed, then he cannot for any danger of tempest justify the throwing of them overboard; for there it holdeth which was spoken by the Roman, when he alleged the same necessity of weather to hold him from embarking, *Necesse est ut eam, non ut vivam*. In the case put before of husband and wife, if they join in committing treason, the necessity of obedience doth not excuse the offence as it doth felony, because it is against the commonwealth.

So if a fire be taken in a street, I may justify the pulling down of the wall or house of another man to save the row from the spreading of the fire; but if I be assailed in my house in a city or town and distressed, and to save my life I set fire to mine own house, which spreadeth and taketh hold upon other houses adjoining, this is not justifiable, but I am subject to their Action upon the se, because I cannot rescue mine own life by doing

13 H. 8. 16. per Shelley.

12 H. 8. 10. per Brooke.

22 A. 1. pl. 56.

6 Ed. 4. 7. per
Sarcf.

4 H. 7. 2.

doing any thing which is against the common
wealth: but if it had been but a private trespass
as the going over another's ground, or the break-
ing of his inclosure when I am pursued for the
safeguard of my life, it is justifiable.

THIS rule admitteth an exception when the
law doth intend some fault or wrong in the party
that hath brought himself into the necessity; so
that is *necessitas culpabilis*. This I take to be the
chief reason why *seipsum defendendo* is not matter
of justification, because the law intends it hath
commencement upon an unlawful cause, because
quarrels are not presumed to grow without some
wrongs either in words or deeds on either part,
and the law that thinketh it a thing hardly tri-
able in whose default the quarrel began, supposeth
the party that kills another in his own defence
not to be without malice; and therefore as it doth
not touch him in the highest degree, so it putteth
him to sue out his pardon of course, and punish-
eth him by forfeiture of goods: for where there
cannot be any malice or wrong presumed,
where a man assails me to rob me, and I kill him
that assaileth me; or if a woman kill him that
assaileth her to ravish her, it is justifiable without
any Pardon.

21 H. 7. 13.

So the common case prooveth this exception, that
is, if a madman commit a felony, he shall not lose
his life for it, because his infirmity came by the act
of God: but if a drunken man commit a felony,
he shall not be excused, because his imperfection
came by his own default; for the reason and loss
of deprivation of will and election by necessitatis
and by infirmity is all one, for the lack of arbitrii
solutum is the matter: and therefore as *in-
firmitas culpabilis* excuseth not, no more doth *nec-
cessitas culpabilis*.

Reg. 6. Corporalis injuria non recipit estimatiōem de futuro.

THE law, in many cases that concern lands or goods, doth deprive a man of his present remedy, and turneth him over to a further circuit of remedies, rather than to suffer an inconvenience: but if it be question of personal pain, the law will not compel him to sustain it and expect remedy, because it holdeth no damage a sufficient recommendation for a wrong which is corporal.

As if the sheriff make a false return that I am summoned, whereby I lose my land; yet because of the inconvenience of drawing all things to uncertainty and delay, if the sheriff's return should not be credited, I am excluded of my averment against it, and am put to mine action of deceit against the sheriff and summoners: but if the sheriff upon a *capias* return a *cepi corpus, & quod languidus in prīsona,* there I may come in and falsify the return of the sheriff to save my imprisonment.

So if a man menace me in my goods, and that he will burn certain evidences of my land which he hath in his hand, if I will not make unto him bond, yet if I enter into bond by this terror, I cannot avoid it by plea, because the law holdeth an inconvenience to avoid a specialty by such matter of averment; and therefore I am put to mine action against such a menacer: but if he restrain my person, or threaten me with a battery, or with the burning of my house, which is a safety and protection to my person, or with burning an instrument of manumission, which is an evidence of my enfranchisement; if upon such menace or duresse I make a deed, I shall avoid it by plea.

So if a trespasser drive away my beasts over another's ground, I pursue them to rescue them, ^{13 H. 8. 15.} ^{21 H. 7. 28.} yet

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yet am I trespasser to the stranger upon whose ground I came; but if a man assail my person and I fly over another's ground, now am I a trespasser.

THIS ground some of the canonists do apply inferr out of Christ's sacred mouth, *Amen, est enim corpus supra vestimentum*, where they say *vestimenta* comprehendeth all outward things appertaining to a man's condition, as lands and goods, which they say are not in the same degree with that which is corporal; and this was the reason of the ancient *lex talionis, oculus pro oculo, dens pro dente,* so that by that law *corporalis injuria de præterito non recipit estimationem*: but our law, when the injury is already executed and inflicted, thinketh it better satisfaction to the party grieved to relieve him of damage, and to give him rather profit than revenge; but it will never force a man to tolerate a corporal hurt, and to depend upon that inferior kind of satisfaction, *ut in dammagis.*

Reg. 7. *Excusat aut extenuat delictum in capitalibus, quod non operatur idem in civilibus.*

IN capital causes, *in favorem vitæ*, the law will not punish in so high a degree, except the malice of the will and intention appear; but in civil trespasses and injuries that are of an inferior nature, the law doth rather consider the damage of the party wronged, than the malice of him that was the wrong-doer: and therefore,

THE law makes a difference between killing man upon malice fore-thought, and upon present heat: but if I give a man slanderous words whereby I damnify him in his name and credit it is not material whether I use them upon sudden choler and provocation or of set malice but in an action upon the case I shall render damages alike.

So if a man be killed by misadventure, as by arrow at buts, this hath a pardon of course : but if a man be hurt or maimed only, an action trespass lieth, though it be done against the party's mind and will, and he shall be punished ^{Stamf. 16.} the law as deeply as if he had done it of ^{6 Ed. 4. 7.} malice.

So if a surgeon authorized to practise, do through negligence in his cure cause the party to whidh ^{Stamf. 16.} the surgeon shall not be brought in question of his life ; and yet if he do only hurt the wound, so the whereby the cure is cast back, and death insues on n ^{so} he is subject to an action upon the case for injur misfeasance.

So if baron and feme be, and they commit fe- him i y together, the feme is neither principal nor an necessary, in regard of her obedience to the will oleration her husband : but if baron and feme join in inferior committing a trespass upon land or otherwise, action may be brought against them both.

So if an infant within years of discretion, or a man kill another, he shall not be impeached thereof; but if they put out a man's eye, or do like corporal hurt, he shall be punished in p^{ass.}

So in felonies the law admitteth the difference ^{35 H. 6. 11.} principal and accessory, and if the principal or be pardoned, the proceeding against the accessory faileth ; but in a trespass, if one command his man to beat you, and the servant after ^{17 H. 4. 19.} battery die, yet your action of trespass stands against the master.

. 8. *Æstimatio præteriti delicti ex postremo facto nunquam crescit.*

THE law construeth neither penal laws, nor facts by intendments, but considereth the same in degree, as it standeth at the time when committed ; so as if any circumstance or matter

matter be subsequent, which laid together with the beginning should seem to draw it to a higher nature, yet the law doth not extend or amplify the offence.

21 H. 4. 12.

THEREFORE if a man be wounded, and the percussor is voluntarily let go at large by the goaler, and after, death ensueth of the hurt, yet this is no felonious escape in the goaler.

So if the villain strike the heir apparent of the lord, and the lord dieth before, and the person hurt who succeedeth to be lord to the villain dieth after, yet this is no petty treason.

So if a man compasse and imagineth the death of one that after cometh to be King of the land not being any person mentioned within the statute of 25 Ed. III. this imagination precedent not high treason.

So if a man use slanderous words of a person upon whom some dignity after descends that maketh him a peer of the realm, yet he shall have but a simple action of the case, and not in the nature of a *scandalum Magnatum* upon the statute.

So if *John Stile* steal six pence from me in money, and the King by his proclamation doth ratify monies, that the weight of silver in the piece of six pence should go for twelve pence, yet I shall remain petty larceny and no felony: yet in all civil reckonings the alteration shall place; as if I contract with a labourer to some work for twelve pence, and the inhand of money cometh before I pay him, I shall satisfy my contract with a six-penny piece so raised.

So if a man deliver goods to one to keep, after retain the same person into his service, afterwards goeth away with his goods, this 28 H. 8. pl. 2. no felony by the statute of 21 H. VIII. because he was no servant at that time.

In like manner, if I deliver goods to the servant of *J. S.* to keep, and after die, and

S. my executor ; and before any new commandment of I. S. to his servant for the custody of the same goods, his servant goeth away with them, this is also out of the statute. *Quod nota.*

BUT note that it is said *præteriti delicti* ; for any accessory before the fact is subject to all the contingencies pregnant of the fact, if they be circumstances of the same fact : as if a man command or counsel one to rob a man, or beat him grievously, and murder ensue, in either case he accessory to the murder, *quia in criminalibus ræstantur accidentia.*

Reg. 9. *Quod remedio defituitur ipsa re valet si culpa absit.*

THE benignity of the law is such, as when to reserve the principles and grounds of law it deriveth a man of his remedy without his own fault, it will rather put him in a better degree and condition than in a worse ; for if it disable him to pursue his action, or to make his claim, sometimes it will give him the thing itself by operation of law without any act of his own, sometimes it will give him a more beneficial remedy.

AND therefore if the heir of the disseisor which is in by descent make a lease for life, the remainder for life unto the disseesee, and the lessee for life die, now the franktenement is cast upon the disseesee by act in law, and thereby he is disabled to bring his *præcipe* to recover his right ; whereupon the law judgeth him in his antient right as strongly as if it had been recovered and executed by action, which operation of law is by an antient term and word of law called a *remitter* ; but if there may be assigned any default or laches in him, either in accepting the freehold, or in accepting the interest that draws the freehold,

freehold, then the law denieth him any such benefit.

Lit. pl. 682.

AND therefore if the heir of the disseisor make a lease for years, the remainder in fee to the disseilee, the disseilee is not remitted; and yet the remainder is in him without his own knowledge or assent; but because the freehold is not cast upon him by act in law, it is no remitter. *Quod nota.*

Lit. pl. 685.

So if the heir of the disseisor infeoff the disseilee and a stranger, and make him livery, although the stranger die before any agreement or taking of the profits by the disseilee, yet he is not remitted; because though a moiety be cast upon him by survivor, yet that is but *jus accrescendi* and it is no casting of the freehold upon him by act in law, but he is still as an immediate purchaser, and therefore no remitter.

Sembler in cest
case clercement
le ley deeme
contrary.
Lit. pl. 666.

So if the husband be seised in the right of his wife, and discontinue and dieth, and the feme takes another husband, who takes a feoffment from the discontinuuee to him and his wife, the feme is not remitted; and the reason is, because she was once sole, and so a laches in her for not pursuing her right: but if the feoffment taken back had been to the first husband and herself, she had been remitted.

2 M. condic. 3.

YET if the husband discontinue the lands of the wife, and the discontinuuee make a feoffment to the use of the husband and wife, she is not remitted; but that is upon a special reason, upon the letter of the statute of 27 H. VIII. of uses, that wisheth that the *cestui que use* shall have the possession in quality and degree as he had the use; but that holdeth place only upon the first vesting of the use; for when the use is absolutely executed and vested, then it doth insue merely the nature of possessions; as if the discontinuuee had made a feoffment in fee to the use of I. S. for life, the remainder to the use of baron and feme, and lessee for life die, now the feme is remitted, *cansa qua supra.*

34 H. 8. Dy. 3.
49.

Also

Also if the heir of the disseisor make a lease for life, the remainder to the disseisee, who chargeth the remainder, and the lessee for life dies, the disseisee is not remitted; and the reason is, his intermeddling with the wrongful remainder, whereby he hath affirmed the same to be in him, and so accepted it: but if the Heir of the disseisor had granted a rent-charge to the disseisee, and afterwards made a lease for life, the remainder to the disseisee, and the lessee for life had died, the disseisee had been remitted; because there appeareth no assent or acceptance of any estate in the freehold, but only of a collateral charge.

So if the feme be disseised and intermarry with the disseisor, who makes a lease for life, rendering rent, and dieth leaving a son by the same ^{5 Ed. 3. 17.} feme, and the son accepts the rent of the lessee for life, and then the feme dies, and the lessee for life dies, the son is not remitted; yet the frank ^{48 H. 8. pl. 207.} tenement was cast upon him by act in law, but because he had agreed to be in the tortious reversion by acceptance of the rent, therefore no remitter.

So if tenant in tail discontinue, and the discontinuer make a lease for life, the remainder to the issue in tail being within age, and at full age the lessee for life surrendereþ to the issue in tail, and tenant in tail dies, and lessee for life dies, yet the same issue is not remitted; and yet if the issue had accepted a feoffment within age, and had continued the taking of the profits when he came of full age, and then the tenant in tail had died, notwithstanding his taking of the profits he had been remitted: for that which guides the remitter, is, if he be once in of the freehold without any laches: as if the heir of the disseisor enfeoffs the heir of the disseisee who dies, and it descends to a second heir upon whom the frank tenement is cast by descent, who enters and takes

the profits, and then the disseisee dies, this is a remitter, *causa qua supra*.

Lit. pl. 3. 6.

ALSO if tenant in tail discontinue for life, and take a surrender of the lessee, now is he remitted and seised again by force of the tail, and yet he cometh in by his own act: but this case differeth from all other cases; because the discontinuance was but particular at first, and the new gained reversion is but by intendment and necessity of law; and therefore is but as it were *ab initio*, with a limitation to determine whensoever the particular discontinuance endeth, and the estate cometh back to the ancient right.

To proceed from cases of remitter, which is a great branch of this rule, to other cases: if executors do redeem goods pledged by their testator with their own money, the law doth convert

6 H. 8. pl. 3. Dy. so much goods as doth amount to the value of that they laid forth, to themselves in property, and upon a plea of fully administered it shall be allowed: the reason is, because it may be matter of necessity for the well administering of the goods of the testator, and executing their trust that they disburse money of their own: for else perhaps the goods would be forfeited, and he that had them in pledge would not accept other goods but money; and so it is a liberty which the law gives them, and they cannot have any suit against themselves; and therefore the law gives them leave to retain so much goods by way of allowance: and if there be two executors, and one of them pay the money, he may likewise retain against his companion if he have notice thereof.

3 Eliz. 187.
pl. 8.

BUT if there be an overplus of goods, above the value of that he shall disburse, then ought he by his claim to determine what goods he doth elect to have in value; or else before such election, if his companion do sell all the goods, he hath no remedy but in spiritual court: for to say

He should be tenant in common with himself and his companion *pro rata* of that he doth lay out, the law doth reject that course for intricateness.

So if I have a lease for years worth 20*l.* by the year, and grant unto *I. D.* a rent of 10*l.* a year, and after make him my executor; now *I. D.* shall be charged with assets 10*l.* only, and the other 10*l.* shall be allowed and considered to him; and the reason is because the not refusing shall be accounted no laches unto him, because an executorship is *pium officium*, and matter of conscience and trust, and not like a purchase to a man's own use.

^{19 H. 8. pl. 7.}
in fine.

^{22 Aff. 52 F.}
Rec. in value

^{23.}

Like law it is, where the debtor makes the debtee his executor, the debt shall be considered in the assets, notwithstanding it be a thing in action.

^{2 H. 4. 21.}

Cond. 185.

^{2 H. 7. 5.}

^{37 H. 6. 32.}

So if I have a rent-charge, and grant that upon condition, now though the condition be broken, the grantees estate is not defeated till I have made my claim; but if after such grant my father purchase the land, and it descend to me, now if the condition be broken, the rent ceaseth without claim: but if I had purchased the land myself, then I had extinguished mine own condition, because I had disabled myself to make my claim, and yet a condition collateral is not suspended by taking back an estate; as if I make a feoffment in fee, upon condition that *I. S.* shall marry my daughter, and take a lease for life from my feoffee, if the feoffee break the condition, I may claim to hold in by my fee-simple; but the case of the charge is otherwise, for if I have a rent-charge issuing out of twenty acres, and grant the rent over upon condition, and purchase but one acre, the whole condition is extinct, and the possibility of the rent by reason of the condition, is as fully destroyed as if there had been no rent in esse.

^{20 H. 7. per}
Pol.

^{25 H. 6 Fitz.}
Barr. 162.

30 H. 6. pl.
Grants 91.

So if the King grant to me the wardship of *J. S.* the son and heir of *J. S.* when it falleth; because an action of covenant lieth not against the King, I shall have the thing myself in interest.

7 H. 6. 40.

BUT if I let land to *J. S.* rendring a rent with a condition of re-entry, and *J. S.* be attainted, whereby the lease cometh to the King, now the demand upon this land is gone, which should give me benefit of re-entry, and yet I shall not have it reduced without demand; and the reason of difference is, because my condition in this case is not taken away in right, but only suspended by the privilege of the possession; for if the King grant the lease over, the condition is revived as it was.

9 Ed. 2. Fitz.
Arrangements
18.

ALSO if my tenant for life grant his estate to the King, now if I will grant my reversion over, the King is not compellable to attorn, therefore it shall pass by grant by deed without attornment.

So if my tenant for life be, and I grant my reversion *per auter vie*, and the grantee die, living *cestui que vie*, now the privity between tenant for life and me is not restored, and I have no tenant in *esse* to attorn; therefore I may pass my reversion without attornment. *Quod nota.*

So if I have a nomination to a church, and another hath the presentation, and the presentation comes to the King, now because the King cannot be attendant, my nomination is turned to an absolute patronage.

So if a man be seised in an * advowson, and take a wife, and after a title of dower given her, join in improverting the church, and dieth, now because the feme cannot have the turn because of the perpetual incumbency, she shall have all

* 6 Ed. 6. Dy. 72. Vide contra 2 E. 3. fo. 8. que per presentment del feme ladvowson est deveign disimpropriate a tous jours quel est agree in Snr. Cok. Rep. 7. fo. 8. a.

the turns during her life; for it shall not be disappropriated to the benefit of the heir contrary to the grant of tenant in fee-simple.

But if a man grant the third presentment to J. S. and his heirs, and inappropriate the advowson, now the grantee is without remedy, for he took his grant subject to that mischief at first; and therefore it was his laches, and therefore not like the case of the dower; and this grant of the third avoidance is not like *tertia pars advocationis*, or *medietas advocationis* upon a tenancy in common of the advowson: for if two tenants in common be, and an usurpation be had against them, and the usurper do inappropriate, and one of the tenants in common do release, and the other bring his writ of right *de medietate advocationis* and recover; now I take the law to be, that because tenants in common ought to join in presentment, which cannot now be, he shall have the whole patronage: for neither can there be an apportionment that he should present all the turns, and his incumbent but to have a moiety of the profits, nor yet the act of inappropriate shall not ^{45 Ed. 3:} be defeated. But as if two tenants in common be of a ward, and they join in a writ of right of ward, and one release, the other shall recover the entire ward, because it cannot be divided: so shall it be in the other case, though it be an inheritance, and though he bring his action alone.

As if a disseisor be disseised, and the first disselee release to the second disseisor upon condition, and a descent be cast, and the condition broken; now the mean disseisor, whose right is revived, shall enter notwithstanding this descent, because his right was taken away by the act of a stranger.

But if I devise land by the statute of * 32 H. VIII. and the heir of the devisor enters and makes

* Le contrary fuit resolve in Martin Trott's case, pag. 32 Eliz, in Com. Banco, & Pa. 1 Jac. ib. vide 7 R. 2. Scire fac. 3, 41 E. 3. 14. per Finchden.

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a feoffment in fee, and the feoffee dieth seised, this descent binds, and there shall not be a perpetual liberty of entry, upon the reason that he never had seisin whereupon he might ground his action, but he is at a mischief by his own laches; and like law is of the King's patentee; for I see no reasonable difference between them and him in the remainder, which is Littleton's case.

BUT note, that the law by operation and matter in fact will never countervail and supply a title grounded upon a matter of record; and therefore if I be entitled unto a writ of error, and the land descend unto me, I shall never be remitted; no more shall I be unto an attaint, except I may also have a writ of right.

^{25 H. 8. Dy. 1.}

7.

So if upon my avowry for services, my tenant disclaim where I may have a writ of right as upon disclaimer, if the land after descend to me, I shall never be remitted.

Reg. 10. *Verba generalia restringuntur ad habilitatem rei vel personæ.*

It is a rule that King's grants shall not be taken or construed to a special intent; it is not so with the grants of a common person, for they shall be extended as well to a foreign intent as to a common intent; yet with this exception, that they shall never be taken to an impertinent or a repugnant intent: for all words, whether they be in deeds or statutes, or otherwise, if they be general and not express and precise, shall be restrained unto the fitness of the matter or person.

Perk. pl. 108.
Part 3.

As if I grant common *in omnibus terris meis* in D. and I have in D. both open grounds and several, it shall not be stretched to my common in several, much less in my gardens and orchards.

^{14 H. 8. 2.}

So if I grant to a man *omnes arbores meas crecentes supra terras meas* in D. he shall not have apple-trees, or other fruit-trees growing in my gardens

gardens or orchards, if there be any other trees upon my ground.

So if I grant to *I. S.* an annuity of 10*l.* a year ^{41 Ed. 3. 6. 19.} pro consilio impenso & impendendo, if *I. S.* be a physician, it shall be understood of his counsel in physick ; and if he be a lawyer, of his counsel in law.

So if I do let a tenement to *I. S.* near by my dwelling house in a borough, provided that he shall not erect or use any shop in the same without my licence, and afterwards I licence him to erect a shop, and *I. S.* is then a miller, he shall not by virtue of these general words erect a joyners shop.

So the statute of chanteries that willeth all lands to be forfeited, given or employed to a superstitious use, shall not be construed of the glebe lands of parsonages : nay farther, if the lands be given to the Parson of *D.* to say a mass in his church of *D.* this is out of the statute, because it shall be intended but as an augmentation of his glebe ; but otherwise had it been, if it had been to say a mass in any other church but his own.

So in the statute of wrecks, that willeth that goods wreck'd where any live domestical creature remains in a vessel, shall be preserved to the use of the owner that shall make his claim by the space of one year, doth not extend to fresh victuals or the like, which is impossible to keep without perishing or destroying it ; for in these and the like cases general words may be taken, as was said, to a rare and foreign intent, but never to an unreasonable intent.

Reg. 11. *Jura sanguinis nullo jure civili dirimi possunt.*

THEY be the very words of the civil law, which cannot be amended to explain this rule. *Hæres*

est nomen Juris, Filius est nomen Naturæ: therefore corruption of blood taketh away the privity of the one, that is, of the heir, but not of the other, that is, of the son; therefore if a man be attainted and murdered by a stranger, the eldest son shall not have the appeal, because the appeal is given to the heir, for the youngest sons who are equal in blood shall not have it; but if an attainted person be killed by his son, this is petty treason, for that the privity of a son remaineth: for I admit the law to be, that if the son kill his father or mother it is petty treason, and that there remaineth so much in our laws of the ancient footsteps of *potestas patris* and natural obedience, which by the law of God is the very instance itself; and all other government and obedience is taken but by equity, which I add because some have thought to weaken the law in that point.

So if land descend to the eldest son of a person attainted from his ancestor, of the mother held in knight's service, the guardian shall enter, and oust the father, because the law giveth the father that prerogative in respect he is his son and heir; for of a daughter or a special heir in tail he shall not have it; but if the son be attainted, and the father covenant in consideration of natural love to stand seised of land to his use, this is good enough to raise an use, because the privity of a natural affection remaineth.

So if a man be attainted and have a charter of pardon, and be returned of a jury between his son and *I. S.* the challenge remaineth; for he may maintain any suit of his son, notwithstanding the blood be corrupted.

So by the statute of 21. the ordinary ought to commit the administration of his goods that was attainted, and purchase his charter of pardon to his children, though born before the pardon, for Ed. 6. Adm. it is no question of his inheritance: for if one brother of the half blood die, the administration ought

ought to be committed to his other brother of the half blood, if there be no nearer by the father.

So if the uncle by the mother be attainted and 33 H. 6. ss. pardoned, and land descend from the father to the son within age, held in socage, the uncle shall be guardian in socage; for that favoureth so little of the privity of heir, as the possibility to inherit shitteth not.

BUT if a feme tenant in tail assent to the rafisher, and have no issue, and her cousin is attainted, and pardoned, and purchaseth the re-^s Ed. 4. s. version, he shall not enter for a forfeiture. For though the law giveth it not in point of inheritance, but only as a perquisite to any of the blood, so he be next in estate; yet the recomence is understood for the stain of his blood, which cannot be considered when it is once wholly corrupted before.

So if a villain be attainted, yet the lord shall have the issues of his villain born before or after the attainder; for the lord hath them *jure naturae* but as the increase of a flock.

QUÆRE, whether if the eldest son be attainted and pardoned, the lord shall have aid of his tenants to make him a knight, and it seemeth he shall; for the words of the writ hath *filium primogenitum*, and not *filium & heredem*, and the like writ hath *pur file marrier* who is no heir. F. N. Br. 829.

Register fo. 87.

Reg. 12. *Receditur a placitis juris, potius quam injuria & delicta maneant impunita.*

THE law hath many grounds and positive learnings, which are not of the maxims and conclusions of reason; but yet are learnings received with the law set down, and will not have called in question: these may be rather called *placita juris* than *regulae juris*; with such maxims the law will expense, rather than crimes and wrongs should be

be unpunished, *quia salus populi suprema lex*; and *salus populi* is contained in the repressing offence by punishment.

THEREFORE if an advowson be granted to two and the heirs of one of them, and an usurpation be had, they both shall join in a writ of right of advowson; and yet it is a ground in law, that writ of right lieth of no less estate than a fee simple; but because the tenant for life hath no other several action in the law given him, and also that the jointure is not broken, and so the tenant in fee-simple cannot bring his writ of right alone; therefore rather than he shall be deprived wholly of remedy, and this wrong unpunished, he shall join his companion with him, notwithstanding the feebleness of his estate.

⁴⁶ Ed. 3. 21.

BUT if lands be given to two, and to the heirs of one of them, and they lease in a *præcipe* by default, now they shall not join in a writ of right because the tenant for life hath a several action *viz.* a *Quod ei deforciat*, in which respect the jointure is broken.

So if tenant for life and his lessor join in lease for years, and the lessee commit waste, they shall join in punishing this waste, and *locus vagatus* shall go to the tenant for life, and the damages him in reversion; and yet an action of waste lieth not for tenant for life, but because he in reversion cannot have it alone, because of the mean estate for life, therefore rather than the waste shall be unpunished, they shall join.

⁴⁵ Ed. 3. 3.
²² H. 6. 24.

So if two coparceners be, and they lease the land, and one of them die, and hath issue, and the lessee commit waste, the aunt and the issue shall join in punishing this waste, and the issue shall recover the moiety of the place wasted, and the aunt the other moiety and the entire damage and yet *attio injuriarum moritur cum persona, in favorabilibus magis attenditur quod prodest, quam quod nocet.*

So if a man recovers by erroneous judgment, ^{20 Ed. 2.}
and hath issue two daughters, and one of them
attainted, the writ of error shall be brought
against the parceners, notwithstanding the privity ^{F. descent 16.}
il in the one.

Also it is a positive ground, that the accessa- ^{33 Eliz.}
in felony cannot be proceeded against, until
the principal be tried ; yet if a man upon subtle-
and malice set a madman by some device to
ll him, and he doth so ; now forasmuch as the
adman is excused because he can have no will
or malice, the law accounteth the inciter as prin-
pal, though he be absent, rather than the crime
all go unpunished.

So it is a ground of the law, that the appeal
of murder goeth not to the heir where the party
murdered hath a wife, nor to the younger bro-
ther where there is an elder ; yet if the wife
murder her husband, because she is the party of-
ender, the appeal leaps over to the heir ; and so
the son and heir murder his father, it goeth
to the second brother.

BUT if the rule be one of the higher sort of
maxims that are *regule rationales*, and not *posi-*
tive, then the law will rather endure a particu-
lar offence to escape without punishment, than
to violate such a rule.

As it is a rule that penal statutes shall not be
taken by equity, and the statute of ^{1 Ed. VI.}
acts that those that are attainted for stealing of
horses shall not have their clergy, the judges con-
cease to live, that this did not extend to him that should
be, and had but one horse, and therefore procured a new
he is left for it in ^{2 Ed. VI. cap. 33.} And they had reason
he is for it, as I take the law ; for it is not like the
ed, and se upon the statute of *Glocest.* that gives the
amage of waste against him that holds *pro termino*
iona, parte vel annorum. It is true, that if a man holds
it for a year he is within the statute ; for it is
be noted, that penal statutes are taken strictly
and

Fitz. Corone

^{459.} Ed. 4. M. 28 6.

Stamf. lib. 2.

fol. 60.

Plow. 467.

Lit. cap. 46.

Ed. 3. 31.

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and literally only in the point of defining and setting down the fact and the punishment, and those clauses that do concern them, and not generally in words that are but circumstances and conveyance in the putting of the case, and so set the diversity; for if the law be, that for such an offence a man shall lose his right hand, and the offender hath had his right hand before cut off in the wars, he shall not lose his left hand, but the crime shall rather pass without the punishment which the law assigned, than the letter of the law should be extended; but if the statute of 1 Ed. VI had been, that he that should steal one horse should be ousted of his clergy, then there had been no question at all, but if a man had stolen more horses than one, but that he had been within the statute, *quia omne majus continet in se minus.*

Reg. 13. *Non accipi debent verba in demonstratiōnem falsam, quæ competunt in limitationem vīram.*

THOUGH falsity of addition or demonstration doth not hurt, where you give the thing a proper name, yet nevertheless if it stand doubtful upon the words, whether they import a false reference and demonstration, or whether they be words of restraint that limit the generality of the former name, the law will never intend error or falsehood.

¹² Eliz. 6. 291. THEREFORE if the parish of *Hurst* do extend
²³ Eliz. Dyer into the counties of *Wiltsh.* and *Barksh.* and I
^{376.} grant my close called *Callis*, situate and lying in
^{7 Ed. 6. Dy. 56.} the parish of *Hurst* in the county of *Wiltsh.* and the truth is, that the whole close lieth in the county of *Barksh.* yet the law is, that it passeth well enough, because there is a certainty sufficient in that I have given it a proper name which the false reference doth not destroy, and not upon the reason that these words, in the county of *Wiltsh.*

Wiltsh. shall be taken to go to the parish only, and so be true in some sort, and not to the close, and so to be false: For if I had granted *omnes terras meas in parochia de Hurst in com. Wiltsh.* and had no lands in *Wiltsh.* but in *Barksh.* nothing d past.

But in the principal case, if the close called ^{9 Ed. 4. 7.} *Wils.* had extended part into *Wiltsh.* and part in-^{21 Ed. 3. 18.} *Barksh.* then only that part had passed which in *Wiltsh.*

So if I grant *omnes & singulas terras meas in 29 Reg. Iura I. D. quas perquisivi de I. N. in indentura missionis facta I. B. specificat.* if I have land wherein some of these references are true, and the st false, and no land wherein they are all true, thing passeth: as if I have land in the tenure of *I. D.* and purchased of *I. N.* but not specified the indenture to *I. B.* or if I have land which purchased of *I. N.* and specified in the indenture of demise to *I. B.* and not in the tenure of *I. D.*

But if I have some land wherein all these de- monstrations are true, and some wherein part of them are true, and part false, then shall they be ended words of true limitation to pass only those lands wherein all those circumstances are e.

Licet dispositio de interesse futuro sit inutilis, tamen potest fieri declaratio precedens quae sortiatur effectum interveniente novo actn.

The law doth not allow of grants except there a foundation of an interest in the grantor; the law that will not accept of grants of titles, of things in action which are imperfect inter- ests, much less will it allow a man to grant or number that which is no interest at all, but merely future.

1
BUT

BUT of declarations precedent before any interest vested the law doth allow, but with this difference, so that there be some new act or conveyance to give life and vigour to the declaration precedent.

Now the best rule of distinction between grants and declarations is, that grants are never countermandable, nor in respect of the nature of the conveyance or instrument, though sometime in respect of the interest granted they are, whereas declarations evermore are countermandable in their natures.

AND therefore if I grant unto you, that if you enter into an obligation to me of 100*l.* and after do procure me such a lease, that then the same obligation shall be void, and you enter into such an obligation unto me, and afterwards do procure such a lease, yet the obligation is simple, because the defeasance was made of that which was not.

27 Ed. 3.

So if I grant unto you a rent-charge out of white acre, and that it shall be lawful for you to distrain in all my other lands whereof I am now seised, and which I shall hereafter purchase; although this be but a liberty of distress, and no rent save only of white acre, yet as to the lands afterwards to be purchased the clause is void.

29 Ed. 3. 6.
24 Eliz.

So if a reversion be granted to *J. S.* and *J. D.* a stranger by his deed do grant to *J. S.* that if he purchase the particular estate, he will attorn to the grant, this is a void attornment, notwithstanding he doth afterwards purchase the particular estate.

13, 14 Eliz.
20, 21 Eliz.
25 Eliz.

BUT of declarations the law is contrary; if the disseisee make a charter of feoffment to *J. S.* and a letter of attorney to enter and make livery and seisin, and deliver the deed of feoffment, and afterwards livery and seisin is made accordingly, this is a good feoffment; and yet he had no other thing than a right at the time of the delivery

delivery of the charter; but because a deed of feoffment is but matter of declaration and evidence, and there is a new act which is the livery <sup>M. 32. &c
39 Eliz.</sup> subsequent, therefore it is good in law.

So if a man make a feoffment to *I. S.* upon condition to enfeoff *J. N.* within certain days, and there are deeds made both of the first feoffment and the second, and letters of attorney accordingly, and both those deeds of feoffment, and letters of attorney are delivered at a time, so that the second deed of feoffment and letters of attorney are delivered when the first feoffee had nothing in the land; and yet if both liveries be made accordingly, all is good. ^{36 Eliz.}

So if I covenant with *I. S.* by indenture, that before such a day I will purchase the manor of *D.* and before the same day I will levy a fine of the same land, and that the same fine shall be to certain uses which I express in the same indenture; this indenture to lewd uses being but matter of declaration and countermandable at my pleasure will suffice, though the land be purchased after; because there is a new act to be one, *viz.* the fine.

But if there were no new act, then otherwise ^{25 Eliz.} is; as if I covenant with my son, in consideration of natural love to stand seised unto his use of the lands which I shall afterwards purchase, yet the use is void; and the reason is, because there is no new act, nor transmutation of possession following to perfect this inception; for the use must be limited by the feoffor, and not the coffeee, and he had nothing at the time of the covenant.

So if I devise the manor of *D.* by special <sup>Com. Plowd.
Rigden's case.</sup> name, of which at that time I am not seised, and after I purchase it, except I make some new publication of my will, this devise is void; and the reason is, because that my death, which is the consummation of my will, is the act of God,

and

and not my act, and therefore no such new act as the law requireth.

But if I grant unto J. S. authority by my deed to demise for years, the land whereof I am now seised, or hereafter shall be seised; and after I purchase the lands, and J. S. my attorney doth demise them; this is a good demise, because the demise of my attorney is a new act, and all one with a demise by myself.

21 Eliz.

But if I mortgage land, and after covenant with J. S. in consideration of money which I receive of him, that after I have entered for the condition broken, I will stand seised to the use of the same J. S. and I enter, and this deed is enrolled, and all within the six months, yet nothing passeth away, because this enrollment is no new act, but a perfective ceremony of the first deed of bargain and sale; and the law is more strong in that case, because of the vehement relation which the enrolment hath to the time of the bargain and sale; at what time he had nothing but a naked condition.

Ed. 6. Br.

So if two jointenants be, and one of them bargain and sell the whole land, and before the enrolment his companion dieth, nothing passeth of the moiety accrued unto him by survivor.

Reg. 15. *In criminalibus sufficit generalis malitia intentionis cum facto paris gradus.*

ALL crimes have their conception in a corrupt intent, and have their consummation and issuing in some particular fact; which though it be not the fact at which the intention of the malefactor levelled, yet the law giveth him no advantage of the error, if another particular ensue of as high a nature.

18 Eliz. Sanders case com.
474

THEREFORE if an impoisoned apple be laid in a place to imposon J. S. and J. D. cometh by chance and eateth it, this is murder in the principality.

cipal that is actor, and yet the malice *in individuo* was not against *I. D.*

So if a thief find the door open, and come in Cr. I. peace by night and rob an house, and be taken with f. 30. the manner, and break a door to escape, this is burglary; yet the breaking of the door was without any felonious intent, but it is one entire act.

So if a caliver be discharged with a murderous intent at *I. S.* and the piece break and strike into the eye of him that dischargeth it, and killeth him, he is *felo de se*, and yet his intention was not to hurt himself; for *felonia de se* and murder are *crimina paris gradus*. For if a man pursuade another to kill himself, and be present when he doth so, he is a murderer. Cave.

BUT quare, if *I. S.* lay impoisoned fruit for some other stranger his enemy, and his father or master come and eat it, whether this be petty reason, because it is not altogether *crimen paris radus*. Cr. Just. peace fol. 18, 19.

Reg. 16. *Mandata licita recipiunt strictam interpretationem, sed illicita latam & extensam.*

IN committing of lawful authority to another, man may limit it as strictly as it pleaseth him, and if the party authorized do transgress his authority, though it be but in circumstance expressed, it shall be void in the whole act.

BUT when a man is author and mover to another to commit an unlawful act, then he shall not excuse himself by circumstances not pursued.

THEREFORE if I make a letter of attorney to *I. S.* to deliver livery and feisin in the capital mes-
age, and he doth it in another place of the
land, or between the hours of two and three, and
doth it after or before; or if I make a charter
feoffment to *I. D.* and *I. B.* and express the
feisin to be delivered to *I. D.* and my attorney
10 H. 7. 19.
15, 16.
16 El. Dy. 337.
16 El. Dy. 337.
11 El. Dy. 283.
38 H. 8. Dy. 68.

deliver it to *I. B.* in all these cases the act of the attorney, as to execute the estate, is void; but if I say generally to *I. D.* whom I mean only to enfeoff, and my attorney make it to his attorney, it shall be intended, for it is a livery to him in law.

18 Eliz. Sanders
case. Com. 175.

BUT on the other side, if a man command *I. S.* to rob *I. D.* on *Shooters-hill*, and he doth it on *Gads-hill*, or to rob him such a day, and he doth it the next day, or to kill *I. D.* and he doth it not himself but procureth *I. B.* to do it; or to kill him by poison, and he doth it by violence; in all these cases, notwithstanding the fact be not executed in circumstance, yet he is accessory nevertheless.

Ibidem.

BUT if it be to kill *I. S.* and he killeth *I. D.* mistaking him for *I. S.* then the acts are distant in substance, and he is not accessory.

AND be it that the facts be of differing degrees, and yet of a kind:

As if a man bid *I. S.* to pilfer away such things out of a house, and precisely restrain him to do it sometime when he is gotten in without breaking of the house, and yet he breaketh the house, yet he is accessory to the burglary: for a man cannot condition with an unlawful act, but he must at his peril take heed how he putteth himself into another man's hands.

18 Eliz. in
Sanders case.
pl. Com. 475.

BUT if a man bid one rob *I. S.* as he goeth to *Sturbridge-fair*, and he rob him in his house, the variance seems to be of substance, and he is not accessory.

Reg. 17. *De fide & officio Judicis non recipitur quæstio; sed de scientia, si error sit juris facti.*

THE law doth so much respect the certainty of judgments, and the credit and authority of judges, as it will not permit any error to be assigned than impeacheth

impeacheth them in their trust and office, and in wilful abuse of the same; but only in ignorance, and mistaking either of the law or of the case and matter in fact.

AND therefore if I will assign for error, that F.N. br. fol. 21; whereas the verdict passed for me, the court ^{7 H. 7. 4.} received it contrary, and so gave judgment against me, this shall not be accepted.

So if I will allege for error, that whereas I. S. 3 H. 6. Aff. 3; offered to plead a sufficient bar, the court refused it, and drove me from it, this error shall not be allowed.

BUT the greatest doubt is where the court doth ^{2 M. Dy. 114.} determine of the verity of the matter in fact; so that it is rather a point of trial than a point of judgment, whether it shall be re-examined in error.

As if an appeal of maim be brought, and the court, by the assistance of the chirurgeons ad-^{1 Mar. 5.}
^{28 Aff. pl. 15.}
^{21 H. 7. 40. 35.} judge it to be a maim, whether the party grieved may bring a writ of error; and I hold the law to be he cannot.

So if one of the Prothonotaries of the common ^{3 H. 4. 3.} pleas bring an affize of his office, and allege fees belonging to the same office in certainty, and issue is taken upon these fees, this issue shall be tried ^{1 Mar. Dy. 89.}
^{5 Mar. Dy. 16.} by the judges by way of examination; and if they determine it for a plaintiff, and he have judgment to recover arrearages accordingly, the defendant can bring no writ of error of this judgment, though the fees in truth be other.

So if a woman bring a writ of dower, and the tenant plead her husband was alive, this shall be ^{8 H. 6. 23.}
^{2 El. 285. Dy.}
^{43 Aff. 26.} tried by proofs and not by jury; and upon judgment given on either side no error lies. ^{41 Aff. 5.}
^{39 Aff. 9.}
^{5 Ed. 4. 3.}

So if *nul tiel record* be pleaded, which is to be tried by the inspection of the record, and judgment be thereupon given, no error lieth. ^{9 H. 7. 2.}
^{19 H. 6. 52.}
^{22 Aff. pl. 24.}
^{19 Ed. 4. 6.}

So if in the affize the tenant saith, he is *countee de Dale, & nient nosme countee* in the writ, this shall

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shall be tried by the records of the chancery, and upon judgment given no error lieth.

So if a felon demand his clergy, and read well and distinctly, and the court who is judge thereof do put him from his clergy wrongfully, error shall never be brought upon the attainer.

9 Att. 8.
F. N. Br. 21.

So if upon judgment given upon confession for default, and the court do assess damages, the defendant shall never bring a writ, though the damage be outragious.

AND it seemeth in the case of maim, and some other cases, that the court may dismiss themselves of discussing the matter by examination, and put it to a jury, and then the party grieved shall have his attaint; and therefore it seemeth that the court, that doth deprive a man of his action, should be subject to an action; but that notwithstanding the law will not have, as was said in the beginning, the judges called in question in the point of their office when they undertake to discuss the issue, and that is the true reason; for to say that the reason of these cases should be, because trial by the court should be peremptory as trial by certificate, (as by the Bishop in case of bastardy, or by the marshal of the King, &c.) the cases are nothing alike; for the reason of those cases of certificate is, because if the court should not give credit to the certificate, but should re-examine it, they have no other mean but to write again to the same Lord Bishop, or the same Lord Marshal, which were frivolous, because it is not to be presumed they would differ from their former certificate; whereas in these other cases of error the matter is drawn before a superior court, to re-examine the errors of an inferior court; and therefore the true reason is, as was said, that to examine again that which the court had tried, were in substance to attaint the court.

AND therefore this is a certain rule in error, that error in law is ever of such matters as do appear

21 Att. 24.
11 H. 4. 41.
7 H. 6. 37.

pear upon record ; and error in fact is ever of such matters as are not crossed by the record ; as to allege the death of the tenant at the time of the judgment given, nothing appeareth upon record to the contrary.

So when the infant levies a fine, it appeareth F. N. Br. 21. not upon the record that he is an infant, therefore it is an error in fact, and shall be tried by inspection during nonage.

BUT if a writ of error be brought in the King's bench of a fine levied by an infant, and the court by inspection and examination doth affirm the fine, the infant, though it be during his infancy, shall never bring a writ of error in the parliament upon this judgment ; not but that error lies after ^{2 R. 3. 20.} error, but because it doth now appear upon the record that he is now of full age, therefore it can be no error in fact. And therefore if a man will F. N. Br. 21. assign for error that fact, that whereas the judges ^{9 Ed. 4. 3.} gave judgment for him, the clerks entered it in the roll against him, this error shall not be allowed ; and yet it doth not touch the judges but the clerks ; but the reason is, if it be an error, it is an error in fact ; and you shall never allege an error in fact contrary to the record.

Reg. 18. *Persona conjuncta æquiparatur interesse proprio.*

THE law hath that respect of nature and conjunction of blood, as in divers cases it compareth and matcheth nearness of blood with consideration of profit and interest ; yea, and in some cases alloweth of it more strongly.

THEREFORE if a man covenant in considera^{tion} of blood, to stand seised to the use of his brother, or son, or near kinsman, an use is well raised of this covenant without transmutation of possession ; nevertheless it is true, that consideration of blood is not to ground a personal contract

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upon ; as if I contract with my son, that in consideration of blood I will give unto him such a sum of money, this is a *nudum pactum*, and no *assumpſit* lieth upon it ; for to subject me to an action, there needeth a consideration of benefit, but the use the law raiſeth without suit or action ; and besides, the law doth match real considerations with real agreements and covenants.

¹⁹ Ed. 4. 5.
¹⁹ Ed. 4. 22.
²² H. 6. 35.
²¹ H. 6. 15, 16.
²² H. 6. 5.
²⁰ H. 6.
¹⁴ H. 6. 6.
¹⁴ H. 7. 2.
^{14 & 15} Eliz.
²¹ Ed. 4. 75.
^{Com.} 4. 25.

So if a suit be commenced against me, my son, or brother, I may maintain as well as he in remainder for his interest, or his lawyer for his fee ; and if my brother have a suit against my nephew or cousin, yet it is at my election to maintain the cause of my nephew or cousin, though the adverse party be nearer unto me in blood.

So in challenges of juries, challenge of blood is as good as challenge within distress, and it is not material how far off the kindred be, so the pedigree can be conveyed in a certainty, whether it be of the half blood or whole.

¹⁵ H. 6. 17.
²⁹ H. 6. 50.
²¹ Ed. 4. 13.
¹⁸ H. 6. 21.
¹⁵ Ed. 4. 1.
³⁹ H. 6. 91.
⁷ Ed. 4. 21.
²⁰ Aff. 14.
^{Petk.} 4.
^{D. cap.} 28.

So if a man menace me, that he will imprison or hurt in body my father, or my child, except I make such an obligation, I shall avoid this duresse, as well as if the duresse had been to mine own person : and yet if a man menace me, by taking away or destruction of my goods, this is no good duresse to plead ; and the reason is, because the law can make me reparation of that loss, and so it cannot of the other.

So if a man under the years of twenty-one, contract for the nursing of his lawful child, this contract is good, and shall not be avoided by infancy, no more than if he had contracted for his own aliments or erudition.

Reg. 19. *Non impedit clausula derogatoria, quo minus ab eadem potestate res dissolvantur a quibus constituantur.*

ACTS, which are in their natures revocable, cannot by strength of words be fixed or perpetuated; yet men have put in ure two means to bind themselves from changing or dissolving that which they have set down, whereof one is *clausula derogatoria*, the other *interpositio juramenti*, whereof the former is only pertinent to the present purpose.

THIS *clausula derogatoria* is by the common practical term called *clausula non obstante*, and is of two sorts, *de præterito & de futuro*, the one weakening and disannulling any matter past to the contrary, the other any matter to come; and this latter is that only whereof we speak.

THE *clausula de non obstante de futuro*, the law judgeth to be idle and of no force, because it doth dprise men of that which of all other things is most incident to human condition, and that is alteration or repentance.

THEREFORE if I make my will, and in the end thereof do add such like clause, [Also my will is if I shall revoke this present will, or declare any new will, except the same shall be in writing, subscribed with the hands of two witnesses, that such revocation or new declaration shall be utterly void, and by these presents I do declare the same not to be my will, but this my former will to stand,] any such pretended will to the contrary notwithstanding; yet nevertheless this clause or any the like never so exactly penned, and although it do restrain the revocation but in circumstance and not altogether, is of no force or efficacy to fortify the former will against the second; but I may by parol without writing repeal the same will and make it anew.

28 Ed. 3. cap. 7.

24 Ed. 3. cap. 9.

2 H. 7. 6.

So if there be a statute made that no sheriff shall continue in his office above a year, and if any patent be made to the contrary it shall be void; and if there be any *clausula de non obstante* contained in such patent to dispense with this present act, that such clause also shall be void; yet nevertheless a patent of the sheriff's office made by the King for term of life, with a *non obstante* will be good in law contrary to such statute, which pretendeth to exclude *non obstante*'s; and the reason is, because it is an inseparable prerogative of the crown to dispense with politick statutes, and of that kind; and then the derogatory clause hurteth not.

So if an act of parliament be made wherein there is a clause contained, that it shall not be lawful for the King, by authority of parliament, during the space of seven years, to repeal and determine the same act, this is a void clause, and such act may be repealed within the seven years; and yet if the parliament should enact in the nature of the ancient *lex regia*, that there should be no more parliaments held, but that the king should have the authority of the parliament; this act were good in law, *quia potestas suprema seipsum dissolvere potest, ligare non potest*: for as it is in the power of a man to kill a man, but it is not in his power to save him alive, and to restrain him from breathing or feeling; so it is in the power of a parliament to extinguish or transfer their own authority, but not whilst the authority remains entire to restrain the functions and exercises of the same authority.

So in 28 of K. H. VIII. chap. 17. there was a statute made, that all acts that passed in the minority of Kings, reckoning the same under the years of twenty-four, might be annulled and revoked by their letters patent when they came to the same years; but this act in the first of K. Ed. VI. who was then between the years of ten and eleven,

24 El. Dy. 313.

24 El. Dy. 313.

Eleven, cap. 11. was repealed, and a new law surrogate in place thereof, wherein a more reasonable liberty was given: and wherein, though other laws are made revocable according to the provision of the former law with some new form prescribed, yet that very law of revocation, together Pl. Com. 563. with pardons, is made irrevocable and perpetual, so that there is a direct contrariety between these two laws; for if the former stands, which maketh all latter laws during the minority of Kings revocable without exception of any law whatsoever, then that very law of repeal is concluded in the generality, and so itself made revocable: on the other side, that law making no doubt of the absolute repeal of the first law, though itself were made during the minority, which was the very case of the former law in the new provision which maketh, hath a precise exception, that the law of repeal shall not be repealed.

But the law is, that the first law by the impenitency of it was void *ab initio* & *ipso facto* without repeal; as if a law were made, that no new statute should be made during seven years, and the same statute be repealed within the seven years, if the first statute should be good, then no repeal could be made thereof within that time; or the law of repeal were a new law, and that were disabled by the former law; therefore it is void in itself, and the rule holds, *perpetua lex est nullam legem humanam ac positivam perpetuam esse;* *& clausula quæ abrogationem excludit initio non valeat.*

NEITHER is the difference of the civil law so reasonable as colourable, for they distinguish and say that a derogatory clause is good to disable any latter act, except you revoke the same clause before you proceed to establish any latter disposition or declaration; for they say, that *clausula derogatoria ad alias sequentes voluntates posita in testamento (vix. si testator dicat qd' si contigerit eum facere*

facere aliud testamentum non vult illud valere) operatur quod sequens dispositio ab ipsa clausula reguletur & per consequens quod sequens dispositio duretur si voluntate, & sic quod non sit attendendum. This sense is, that where a former will is made and after a latter will, the reason why without an express revocation of the former will it is by implication revoked, is because of the repugnancy between the disposition of the former and the latter.

But where there is such a derogatory clause, there can be gathered no such repugnancy; because it seemeth that the testator had a purpose at the making of the first will to make some shew of a new will, which nevertheless his intention was should not take place: but this was answered before; for if that clause were allowed to be good until a revocation, then could no revocation at all be made; therefore it must needs be void by operation of law at first. Thus much of *clausula derogatoria.*

Reg. 20. *Aitus incaptus, cuius perfectio pendet a voluntate partium, revocari potest; si autem pendet ex voluntate tertiae personæ, vel ex contingenti, non revocari non potest.*

IN acts that are fully executed and consummate, the law makes this difference, that if the first parties have put it in the power of a third person, or of a contingency, to give a perfection to their acts, then they have put it out of their own reach and liberty; therefore there is no reason they should revoke them: but if the consummation depend upon the same consent, which was the inception, then the law accounteth it in vain to restrain them from revoking of it, for they may frustrate it by omission, and *nonfeasance* at a certain time, or in a certain sort or circumstance, so the law permitteth them to dissolve it by

by an express consent before that time, or without that circumstance.

THEREFORE if two exchange land by deed, without deed, and neither enter, they may make a revocation or dissolution of the same exchange by mutual consent; so it be by deed, but not by parol; for as much as the making of an exchange needeth no deed, because it is to be perfected by entry, which is a ceremony notorious in the nature of a livery; but it cannot be dissolved by deed, because it dischargeth that which but title.

So if I contract with *J. D.* that if he lay me to my cellar three tuns of wine before *Mich.* that I will bring into his garner twenty quarters of wheat before *Chrifmas*, before either of these days the parties may by assent dissolve the contract; but after the first day there is a perfection given to the contract by action on the one side, and they may make cross releases by deed or parol, but never dissolve the contract, for there

a difference between dissolving the contract, and release or surrender of the thing contracted for: as if lessee for twenty years make a lease for ten years, and after he take a new lease for five years, yet this cannot inure by way of surrender: or a petty lease derived out of a greater cannot be surrendered back again, but inureth only by dissolution of contract; for a lease of land is but a contract executory from time to time of the profits of the land, to arise as a man may sell his son or his tithe to spring or to be perceived for divers future years.

BUT to return from our digression; on the other side, if I contract with you for cloth at such price as *J. S.* shall name; there if *J. S.* refuse to name, the contract is void; but the parties cannot discharge it, because they have put it in the power of the third person to perfect.

11 H. 7. 19.

1 R. 2.

F. atturment
8.

31 Ed. 1. F.Q.

Imp. 185.

14 Ed. 4. 2.

38 Ed. 3. 35.

14 Ed. 4. 2.

So if I grant my reversion, though this be an imperfect act before atturment; yet because the atturment is the act of a stranger, this is not simply revocable, but by a policy or circumstance in law, as by levying a fine, or making a bargain and sale, or the like.

So if I present a clerk to the Bishop, now can I not revoke this presentation, because I have put it out of myself, that is, in the Bishop, by admission, to perfect my act begun.

THE same difference appeareth in nomination and elections; as if I enfeoff *I. S.* upon condition to enfeoff such a one as *I. D.* shall name within a year, and *I. D.* name *I. B.* yet before the feoffment, and within the year, *I. D.* may command his nomination, and name again, because no interest passeth out of him. But if I enfeoff *I. S.* to the use of such a one as *I. D.* shall name within a year, then if *I. D.* name *I. B.* it is not revocable, because the use passeth presently by operation of law.

So in judicial acts the rule of the civil law holdeth, *sententia interlocutoria revocari potest, definitiva non potest*; that is, that an order may be revoked, but a judgment cannot; and the reason is, because there is a title of execution or bail given presently unto the party upon judgment and so it is out of the judge to revoke in court ordered by the common law.

Reg. 21. *Clausula vel dispositio inutilis per presumtionem remotam vel causam, ex post facto non fulcitur.*

CLAUSULA *vel dispositio inutilis* are said when the act or the words do work or express no more than the law by intendment would have supplied; and therefore the doubling or iterating of that and no more, which the conceit of the law doth in a sort prevent and preoccupate, is repudiated.

d nugation, and is not supported and made of substance either by a foreign intendment of some purpose, in regard whereof it might be material; or upon any cause emerging afterwards, which may induce an operation of those idle words or its.

AND therefore if a man devise land at this day ^{32 H. 8. Goord} his son and heir, this is a void devise, because ^{39 Ber.} the disposition of the law did cast the same upon ^{2 M.} the heir by descent; and yet if it be knight-service land, and the heir within age, if he take by devise, he shall have two parts of the profits his own use, and the guardian shall have bene-
but of the third; but if a man devise land to two daughters, having no sons, then the de-
vice is good, because he doth alter the disposition ^{29 H. 8. Dy. 12.} of the law; for by the law they shall take in copar-
tuary, but by the devise they shall take jointly; and this is not any foreign collateral purpose, but point of taking of estate.

So if a man make a feoffment in fee, to the use of his last will and testament, these words of special limitation are void, and the law reserveth the ancient use to the feoffor and his heirs; and if the words might stand, then might it be authority by his will to declare and appoint uses, and then though it were knight-service land, he might dispose the whole. As if a man make a feoffment in fee, to the use of the will and testament of a stranger, there the stranger may desire an use of the whole by his will, notwithstanding it be knight-service land; but the reason of the principal case is, because uses before the statute of 27 H. VIII. were to have been dis-
posed by will; and therefore before that statute use limited in the form aforesaid, was but a volous limitation, in regard of the old use that the law reserved was deviseable; and the statute 27. altereth not the law, as to the creating ^{19 H. 8. 11.} and limiting of any use; and therefore after that ^{5 Ed. 4. 8.} statute,

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statute, and before the statute of wills, when no land could have been devised, yet was it a void limitation as before, and so continueth to this day.

BUT if I make a feoffment in fee, to the use of my last will and testament, thereby to declare an estate-tail and no greater estate; and after my Death, and after such estate declared shall expire, or in default of such declaration, then to the use of *J. S.* and his heirs, this is a good limitation; and I may by my will declare an use of the whole land to a stranger, though it be held in knight-service, and yet I have an estate in fee-simple by virtue of the old use during life.

^{19 H. 8. 11.}
^{6 Ed. 4. 8.}

^{32 H. 8. 43. Dy.}
^{20 H. 8. 8. Dy.}
^{7 Eliz. 237. Dy.}

So if I make a feoffment in fee to the use of my right heirs, this is a void limitation, and the use reserved by the law doth take place; and yet if the limitation should be good the heir should come in by way of purchase, who otherwise cometh in by descent; but this is but a circumstance which the law respecteth not, as was proved before.

BUT if I make a feoffment in fee to the use of my right heirs, and the right heirs of *J. S.* this is a good use, because I have altered the disposition of law; neither is it void for a moiety, but both our right heirs when they come in being shall take by joint purchase; and he to whom the first falleth shall take the whole, subject nevertheless to his companions titles, so it have not descended from the first heir to the heir of the heir: for a man cannot be joint-tenant claiming by purchase, and the other by descent, because they be several titles.

So if a man having land on the part of his mother make a feoffment in fee to the use of himself and his heirs, this use, though expressed, shall not go to him and the heirs of the part of his father as a new purchase, no more than it should have done if it had been a feoffment in fee naked.

^{4 M. 135.}
^{pl. 6. Dyer.}

ly without consideration, for the intendment is remote. But if baron and feme be, and they join in a fine of the feme's land, and express an use to the husband and wife and their heirs: this limitation shall give a joint estate by interties to them both; because the intendment of law would have conveyed the use to the feme alone. And thus much touching foreign intendments.

<sup>5 Ed. 4. 8.
19 H. 8. 11.</sup>

FOR matter *ex post facto*, if a lease for life be made to two, and the survivor of them, and they after make partition: now these words (and the survivor of them) should seem to carry purpose as a limitation, that either of them should be statuted in his part for both their lives severally; but yet the law at the first construeth the words but words of dilating to describe a joint estate; and if one of them die after partition there shall be no occupant, but his part shall revert.

<sup>30 Aff. 8. Fitz.
part. 16.
31 H. 8. 46.
Pl. 7. Dy.</sup>

So if a man grant a rent-charge out of ten acres, and grant farther that the whole rent shall issue out of every acre, and distress accordingly, and afterwards the grantee purchase an acre: now this clause should seem to be material to uphold the whole rent; but yet nevertheless the law at first accepteth of these words but as words of explanation, and then notwithstanding the whole rent is extinct.

<sup>4 E. 6. Com. 33.
per Hinde
27 H. 8. 6.</sup>

So if a gift in tail be made upon condition, that if tenant in tail die without issue, it shall be lawful for the donor to enter, and the donee discontinue and die without issue: now this condition should seem material to give him benefit of entry, but because it did at the first limit the estate according to the limitation of law, it worketh nothing upon this matter emergent afterward.

^{22 Aff. Pl. 52.}

So if a gift in tail be made of lands held in knight-service with an express reservation of the same service, whereby the land is held over, and the gift is with warranty, and the land is evicted, and

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and other land is recovered in value against the donor, held in socage, now the tenure which the law makes between the donor and donee shall be in socage, and not in knight-service; because the first reservation was according to the ovelty of service, which was no more than the law would have reserved.

BUT if a gift in tail had been made of lands held in socage with a reservation of knight-service tenure, and with warranty, then because the intendment of law is altered, the new land shall be held by the same service the lost land was, without any regard at all to the tenure paramount: and thus much of matter *ex post facto*.

THIS rule faileth where that the law saith as much as the party, but upon foreign matter not pregnant and appearing upon the same act or conveyance, as if lessee for life be, and he lets for twenty years, if he lives so long; this limitation (if he live so long) is no more than the law saith, but it doth not appear upon the same conveyance or act, that this limitation is nugatory, but it is foreign matter in respect of the truth of the state whence the lease is derived: and therefore if lessee for life make a feoffment in fee, yet the state of the lessee for years is not enlarged against the feoffee; otherwise had it been if such limitation had not been, but that it had been left only to the law.

So if tenant after possibility make a lease for years, and the donor confirms to the lessee to hold without impeachment of waste during the life of tenant in tail, this is no more than the law saith; but the privilege of tenant after possibility is foreign matter, as to the lease and confirmation: and therefore if tenant after possibility do surrender, yet the lessee shall hold disipunishable of waste; otherwise had it been if no such confirmation at all had been made.

16 H. 7. 4.
per Kebble.
24 Ed. 3. 28.
Fitz. pl. 98.

Also heed must be given that it be indeed the same thing which the law intendeth, and which the party expresseth, and not only like or resembling, and such as may stand both together: for if I let land for life rendring a rent, and by my deed warrant the same land, this war-^{20 Ed. 3. Fitz. 7.}ranty in law and warranty in deed are not the ^{21 E. 1. Zouch.}_{189.} same thing, but may both stand together.

THERE remaineth yet a great question on this rule.

A principal reason, whereupon this rule is built, should seem to be because such acts or clauses are thought to be but declaratory, and added upon ignorance of the law, and *ex consuetudine clericorum* upon observing of a common form, and not upon purpose or meaning, and therefore whether by particular and precise words a man may not controul the intendment of the law.

To this I answer, that no precise or express words will controul this intendment of law; but as the general words are void, because they say contrary to that the law saith; so are they which are thought to be against the law: and therefore if I devise my land being knight-service tenure to my heir, and express my intention to be, that the one part should descend to him as the third part appointed by statute, and the other he shall take by devise to his own use, yet this is void; for the law saith, he is in by descent of the whole, and I say he shall be in by devise, which is against the law.

BUT if I make a gift in tail, and say upon condition, that if tenant in tail discontinue, and after die without issue, it shall be lawful for me to enter; this is a good clause to make a condition, because it is but in one case, and doth not cross the law generally: for if the tenant in tail in that case be disseised, and a descent cast, and die without issue, I that am the donor shall not enter.

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BUT if the clause had been, provided that if tenant in tail discontinue, or suffer a descent, or do any other act whatsoever, that after his death without issue it shall be lawful for me to enter: now this is a void condition, for it importeth a repugnancy to law; as if I would over-rule that where the law faith I am put to my action; I nevertheless will reserve to myself an entry.

Reg. 22. *Non videtur consensum retinuisse si quis ex præscripto minantis aliquid immutavit.*

ALTHOUGH choice and election be a badge of consent, yet if the first ground of the act be duresse, the law will not construe that the duresse doth determine, if the party duressed do make any motion or offer.

THEREFORE if a party menace me, except I make unto him a bond of 40*l.* and I tell him that I will do it, but I will make unto him a bond of 20*l.* the law shall not expound this bond to be voluntary, but shall rather make construction that my mind and courage is not to enter into the greater bond for any menace, and yet that I enter by compulsion notwithstanding into the lesser.

BUT if I will draw any consideration to myself, as if I had said, I will enter into your bond of 40*l.* if you will deliver me that piece of plate, now the duresse is discharged; and yet if it had been moved from the duressor, who had said at the first, you shall take this piece of plate, and make me a bond of 40*l.* now the gift of the plate had been good, and yet the bond shall be avoided by duresse.

Reg. 23. *Ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguum verificatione facti tollitur.*

THERE be two sorts of ambiguities of words, the one is *ambiguitas patens*, and the other *Latens*. *Patens* is that which appears to be ambiguous upon the deed or instrument; *Latens* is that which seemeth certain and without ambiguity, for any thing that appeareth upon the deed or instrument; but there is some collateral matter out of the deed, that breedeth the ambiguity.

AMBIGUITAS patens is never holpen by averment, and the reason is, because the law will not couple and mingle matter of specialty, which is of the higher account, with matter of averment, which is of inferior account in law; for that were to make all deeds hollow, and subject to averments, and so in effect, that to pass without deed, which the law appointeth shall not pass but by deed.

THEREFORE if a man give land to *J. D. & J. S. & hereditibus*, and do not limit to whether of their heirs, *i.e.* shall not be supplied by averment to whether of them the intention was, the inheritance should be limited.

So if a man give land in tail, though it be by will, the remainder in tail, and add a *proviso* in this manner: Provided that if he, or they, or any of them do any, &c. according to the usual clauses of perpetuities, it cannot be averred upon the ambiguities of the reference of this clause, that the intent of the devisor was, that the restraint should go only to him in the remainder, and the heirs of his body; and that the tenant in tail in possession was meant to be at large.

Or these infinite cases might be put, for it holdeth generally that all ambiguity of words by matter within the deed, and not out of the deed,

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shall be holpen by construction, or in some case by election, but never by averment, but rather shall make the deed void for uncertainty.

BUT if it be *ambiguitas latens*, then otherwise it is : as if I grant my manor of S. to I. F. and his heirs, here appeareth no ambiguity at all ; but if the truth be, that I have the manors both of South S. and North S. this ambiguity is matter in fact ; and therefore it shall be holpen by averment, whether of them was that the party intended should pass.

So if I set forth my land by quantity, then it shall be supplied by election, and not averment.

As if I grant ten acres of wood in sale, where I have an hundred acres, whether I say it in my deed or no, that I grant out of my hundred acres, yet here shall be an election in the grantee, which ten he will take.

AND the reason is plain, for the presumption of the law is, where the thing is only nominated by quantity, that the parties had indifferent intentions which should be taken, and there being no cause to help the uncertainty by intention, it shall be holpen by election.

BUT in the former case the difference holdeth, where it is expressed, and where not ; for if I recite, Whereas I am seized of the manor of North S. and South S. I lease unto you *unum manerium de S.* there it is clearly an election. So if I recite, Where I have two tenements in St. Dunstan's, I lease unto you *unum tenementum*, there it is an election, not averment of intention, except the intent were of an election, which may be specially averred.

ANOTHER sort of *ambiguitas latens* is correlative unto these : for this ambiguity spoken of before, is when one name and appellation doth denominate divers things, and the second, when the same thing is called by divers names.

As if I give lands to *Christ-Church* in *Oxford*, and the name of the corporation is *Ecclesia Christi in universitate Oxford*, this shall be holpen by averment, because there appears no ambiguity in the words: for this variance is matter in fact, but the averment shall not be of intention, because it doth stand with the words.

For in the case of equivocation the general intent includes both the special, and therefore stands with the words: but so it is not in variance, and therefore the averment must be of matter, that do endure quantity, and not intention.

As to say of the precinct of *Oxford*, and of the university of *Oxford* is one and the same, and not to say that the intention of the parties was, that the grant should be to *Christ-Church* in that university of *Oxford*.

Reg. 24. *Licita bene miscentur, formula nisi juris obfet.*

THE law giveth that favour to lawful acts, that although they be executed by several authorities, yet the whole is good.

As when tenant for life is the remainder in fee, and they join in a livery by deed or without, this is one good entire livery drawn from them both, and doth not inure to a surrender of the particular estate, if it be without deed *, or confirmation of those in the remainder, if it be by deed, but they are all parties to the livery.

So if tenant for life the remainder in fee be, and they join in granting a rent, this is one solid

* Semble clercement le ley d'estre contrary in ambideux cases. car lou est sans fait est livery solement de cestui in le rem' & surr' de partic' ten' autrement ferra forfeiture de son estate, & lou est per fait le livery passa solement de tenant, car il ad le franktene-
ment, vide accordant Sur Co. l. 1. 79. b. 77. a. Com. Plow. 59. A.
40. 2 H. 5. 7. 13 H. 7. 14. 13 E. 4. 4. a. 27 H. 8. 13 M.
16. & 17. El. Dy. 339.

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rent out both their estates, and no double rent, or rent by confirmation.

So if tenant in tail be at this day, and he make a lease for three lives, and his own, this is a good lease, and warranted by the statute of 32 H. VIII. and yet it is good in part by the authority which tenant in tail hath by the common law, that is, for his own life, and in part by the authority which he hath by the statute, that is, for the other three lives.

So if a man seised of lands deviseable by custom, and of other land held in knight-service, and devise all his lands, this is a good devise of all the land customary by the common law, and of two parts of the other land by the statutes.

So in the star-chamber a sentence may be good, grounded in part upon the authority given the court by the statute of 3 H. VII. and in part upon that ancient authority which the court hath by the common law, and so upon several commissions.

BUT if there be any form which law appointeth to be observed, which cannot agree with the diversities of authorities, then this rule faileth.

As if three coparceners be, and one of them alien her purparty, the feoffee and one of the sisters cannot join in a writ *de part' facienda*, because it behoveth the feoffee to mention the statute in his writ.

Vide 1. Instit. 166. b.

*Reg. 25. Præsentia corporis tollit errorem nominis,
& veritas nominis tollit errorem demonstratio-
nis.*

THERE be three degrees of certainty.

1. PRESENCE.

2. NAME.

3. DEMONSTRATION or reference.

WHEREOF the presence the law holdeth of greatest dignity, the name in the second degree, and

and the demonstration or reference in the lowest, and always the error or falsity in the less worthy.

AND therefore if I give a horse to *I. D.* being present, and say unto him, *I. S.* take this; this is a good gift, notwithstanding I call him by a wrong name: but so had it not been if I had delivered him to a stranger to the use of *I. S.* where I meant *I. D.*

So if I say unto *I. S.* here I give you my ring with the ruby, and deliver it with my hand, and the ring bear a diamond and no ruby, this is a good gift notwithstanding I name it amiss.

So had it been if by word or writing, without the delivery of the thing itself, I had given the ring with the ruby, although I had no such, but only one with a diamond which I meant, yet it would have passed.

So if I by deed grant unto you by general words, all the lands that the King hath passed unto me by letters patent dated 10 May, unto this present indenture annexed, and the patent annexed have date 10 July; yet if it be proved that that was the true patent annexed, the presence of the patent maketh the error of the date recited not material; yet if no patent had been annexed, and there had been also no other certainty given, but the reference of the patent, the date whereof was mis-recited, although I had no other patent ever of the King, yet nothing would have passed.

LIKE law is it, but more doubtful, where there is not a presence, but a kind of representation, which is less worthy than a presence, and yet more worthy than a name or reference.

As if I covenant with my ward, that I will tender unto him no other marriage, than the gentlewoman whose picture I delivered him, and that picture hath about it *Ætatis suæ anno 16.* and the gentlewoman is seventeen years old; yet nevertheless if it can be proved that the

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picture was made for that gentlewoman, I may, notwithstanding this mistaking, tender her well enough.

So if I grant you for life a way over my land, according to a plot intended between us, and after I grant unto you and your heirs a way according to the first plot intended, whereof a table is annexed to these presents, and there be some special variance between the table and the original plot, yet this representation shall be certainty sufficient to lead unto the first plot; and you shall have the way in fee nevertheless, according to the first plot, and not according to the table.

So if I grant unto you by general words the land which the King hath granted me by his letters patent, *Quarum tenor sequitur in hæc verba, &c.* and there be some mistaking in the recital and variance from the original patent, although it be in a point material; yet the representation of this whole patent shall be as the annexing of the true patent, and the grant shall not be void by this variance.

Now for the second part of this rule touching the name and the reference, for the explaining thereof, it must be noted what things found in demonstration or addition: as first in lands, the greatest certainty is, where the land hath a name proper, as the manor of *Dale, Grandfield, &c.* the next is equal to that, when the land is set forth by bounds and abuttals, as a close of pasture bounding on the East part upon *Embsden-wood*, on the South upon, &c. It is also a sufficient name to lay the general boundary, that is, some place of larger precinct, if there be no other land to pass in the same precinct, as all my lands in *Dale*, my tenement in *S. Dunstan's parish*, &c.

A farther sort of denomination is to name land by the attendance they have to other lands more notorious, as parcel of my manor of *D.*

belonging to such a college lying upon *Thames* bank.

ALL these things are notes found in denomination of lands, because they be signs to call, and therefore of property to signify and name a place; but these notes that found only in demonstration and addition, are such as are but transitory and accidental to the nature of the place.

As modo in tenura & occupatione of the proprietary tenure or possessor is but a thing transitory in respect of land; *Generatio venit, generatio migrat, terra autem manet in aeternum.*

So likewise matter of conveyance, title, or instrument

As, quæ perquisivi de I. D. quæ descendebant a I. N. patre meo, or, in predicta indentura dimissiosis, or, in predictis literis patentibus specificat.

So likewise *continent' per estimationem 20 acres,* or if (*per estimationem*) be left out, all is one, for it is understood, and this matter of measure, although it seem local, yet it is indeed but opinion and observation of men.

THE distinction being made, the rule is to be examined by it.

THEREFORE if I grant my close called *Dale* in the parish of *Hurst*, in the county of *Southampton*, and the parish likewise extendereth into the county of *Barkshire*, and the whole close of *Dale* lyeth in the county of *Barkshire*; yet because the parcel is especially named, the falsity of the addition burtheneth not, and yet this addition is found in name, but (as it was said) it was less worthy than a proper name.

So if I grant *tenementum meum, or omnia tene- mента mea* (for the universal and indefinite to this purpose are all one) *in parochia Sancti Butolphi extra Aldgate* (where the verity is *extra Bisopspate*) *in tenurâ Guilielmi*, which is true, yet this grant is void, because that which sounds in denomination is false, which is the more worthy; and that

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that which sounds in addition is true, which is the less; * and though *in tenura Guilielmi*, which is true, had been first placed, yet it had been a one.

Vide ib. quæ contraria est lex, car icy auxi le primer certainty est faux.

BUT if I grant *tenementum meum quod perquisi de R. C. in Dale*, where the truth was *T. C.* and I have no other tenements in *D.* but one, this grant is good, because that which soundeth in name, (*viz.* *in Dale*) is true, and that which sounded in addition (*viz.* *quod perquisivi, &c.*) is only false.

So if I grant *prata mea in Dale continentia acras*, and they contain indeed twenty acres, the whole twenty paces.

So if I grant all my lands, being parcels maneris in *D. in prædictis literis patentibus specificat'*, and there be no letters patent, yet the grant is good enough.

THE like reason holds in demonstrations of persons that have been declared in demonstration of lands and places, the proper name of every one is in certainty worthiest: next are such appellations as are fixed to his person, or at least of continuance, as son of such a man, wife of such a husband; or addition of office, as clerk of such a court, &c. and the third are actions or accidents, which found no way in appellation of name, but only in circumstance, which are less worthy, although they may have a poor particular reference to the intention of the grant.

AND therefore if an obligation be made to *J. S. filio & bæredi G. S.* where indeed he is a bastard, yet this obligation is good.

So if I grant land *Episcopo nunc Londinensi qui me erudit in pueritia*, this is a good grant although he never instructed me.

* Semble icy le grant ust este assets bon, cœ fuit resolu par do cur', Co. lib. 3. fo. 10. a. vid. 33 H. 8. Dy. 50. b. 12 El. 292. b. & Co. lib. 2. fo. 33. a.

BUT *e converso*, if I grant land to *I. S. filio & wedi G. S.* and it be true that he is son and heir to *G. S.* but his name is *Thomas*, this is a void grant.

OR if in the former grant it was the Bishop of Canterbury who taught me in my childhood, yet shall it be good (as was said) to the Bishop of London, and not to the Bishop of Canterbury.

THE same rule holdeth of denomination of times, which are such a day of the month, such a day of the week, such a Saint's day or even, to day, to morrow ; these are names of the times.

BUT the day that I was born, the day that I married ; these are but circumstances and addition of times.

AND therefore if I bind myself to do some personal attendance upon you upon *Innocent's day*, if peradventure the day of your birth, and you were not born on that day, yet shall I attend.

THERE resteth two questions of difficulty yet to be resolved upon this rule ; first, of such things whereof men cast out not so much note as that they shall fail of such distinction of name and addition.

As, my box of ivory lying in my study sealed with my seal of arms, my suit of arras with the story of the Nativity and Passion ; of such belongings there can be no name, but all is of description, and of circumstance, and of these I hold law to be, that precise truth of all recited circumstances is not required.

But in such things *ex multitudine signorum colliger identitas vera*, therefore though my box were sealed, and although the arras had the story of the Nativity, and not of the Passion, if I had no other box, nor no other suit, the gifts are good ; and there is certainty sufficient, for the El. things as have no certain denomination.

SECONDLY,

MAXIMS OF THE LAW.

SECONDLY, of such things as do admit the distinction of name and addition, but the notes fall out to be of equal dignity all of name or addition.

As, *prata mea juxta communem fossam in D.* whereof the one is true, the other false, or *tem-
mentum eum in tenura Guilielmi quod perquisivi de
R. C. in prædict' Indent' specificat'*, whereof one is true, and two are false; or two are true, and one false.

So ad curiam quam tenebat die Mercurii tertio die Martii, whereof the one is true, the other false.

Vide livres a-
vant dit pur-
ceft auxi.

IN these cases the former rule *ex multitudine figura-
norum, &c.* holdeth not; neither is the placing of the falsity or verity first or last material, but all must be true, or else the grant is void; always understood, that if you can reconcile all the words, and make no falsity, that is quite out of this rule, which hath place only where there is a direct contrariety, or falsity not to be reconciled to this rule.

As if I grant all my land in *D. in tenura I. S.* which I purchased of *I. N.* specified in a devil to *I. D.* and I have land in *D.* whereof in part of them all these circumstances are true, but I have other lands in *D.* wherein some of them fail, this grant will not pass all my land in *D.* for there these are references, and no words of falsity or error, but of limitation and restraint.

T H
e man
ch be
r of

T H E
U S E
O F T H E
A W;

F O R

preservation of our Persons, Goods,
and good Names, according to the
practice of the Laws and Customs
of this Land.

The Use of the Law, and wherein it principally consisteth.

IH E use of the law consisteth principally in these three things:

1. To secure mens persons from death and violence.
2. To dispose the property of their goods and lands.
3. For preservation of their good names from shame and infamy.

For safety of persons, the law provideth that Surety to keep the peace. man standing in fear of another, may take his before a justice of peace, that he standeth in fear of his life, and the justice shall compel the other

other to be bound with sureties to keep the peace.

Action for
flander, bat-
tery, &c.

If any man beat, wound, or maim another, or give false scandalous words that may touch his credit, the law giveth thereupon an action of the case, for the slander of his good name; and an action of battery, or an appeal of maim, by which recompence shall be recovered, to the value of the hurt, damage or danger.

Appeal of mur-
der given to
the next of kin.

If any man kill another with malice, the law giveth an appeal to the wife of the dead, if he had any, or to the next of kin that is heir, in default of a wife, by which appeal the defendant convicted is to suffer death, and to lose all his lands and goods; but if the wife or heir will not sue, or be compounded withal, yet the King is to punish the offence by indictment or presentment of a lawful inquest and trial of the offender before competent judges; whereupon being found guilty he is to suffer death, and to lose his lands and goods.

Man-slaugh-
ter, when a
forfeiture of
Goods, and
when not.

If one kill another upon a sudden quarrel, this is man-slaughter, for which the offender must die, except he can read; and if he can read yet must he lose his goods, but no lands.

And if a man kill another in his own defence, he shall not lose his life, nor his lands, but he must lose his goods, except the party slain did first assault him, to kill, rob, or trouble him by the highway side, or in his own house, and then he shall lose nothing.

Felon de se.

AND if a man kill himself, all his goods and chattels are forfeited, but no lands.

Felony by mis-
chance.

If a man kill another by misfortune, as shooting an arrow at a butt or mark, or casting a stone over an house, or the like, this is loss of his goods and chattels, but not of his lands, nor life.

Deodand.

If a horse, or cart, or a beast, or any other thing do kill a man, the horse, beast, or other thing is forfeited to the crown, and is called a Deodand.

and usually granted and allowed by the King to the Bishop almoner, as goods are of those that kill themselves.

THE cutting out of a man's tongue, or putting out his eyes maliciously, is felony; for which the offender is to suffer death, and lose his lands and goods.

Cutting out tongues, and putting out eyes, felony.

But for that all punishment is for example's sake, it is good to see the means whereby offenders are drawn to their punishment; and first for matter of the peace.

THE antient laws of *England*, planted here by the Conqueror, were, that there should be officers of two sorts in all the parts of this realm to preserve the peace:

1. *CONSTABULARII Pacis.*
2. *CONSERVATORES Pacis.*

THE office of the constable was, to arrest the parties that he had seen breaking the peace, or The office of the constable. in fury ready to break the peace, or was truly informed by others, or by their own confession, that they had freshly broken the peace; which persons he might imprison in the stocks, or in his own house, as his or their quality required, until they had become bounden with sureties to keep the peace; which obligation from thenceforth was to be sealed and delivered to the constable to the use of the King. And that the constable was to send to the King's exchequer or chancery, from whence process should be awarded to levy the debt, if the peace were broken.

But the constable could not arrest any, nor make any put in bond upon complaint of threatening only, except they had seen them breaking the peace,

USE OF THE LAW.

peace, or had come freshly after the peace was broken. Also, these constables should keep watch about the town for the apprehension of rogues and vagabonds, and night-walkers, and eves-droppers, scouts, and such like, and such as go armed. And they ought likewise to raise hue and cry against murderers, man-slayers, thieves and rogues.

High constables for every hundred.
Petty constable for every village.

OF this office of constable there were high constables, two of every hundred; petty constables one in every village; they were in antient time all appointed by the sheriff of the shire yearly in his court called the sheriff's Tourn, and there they received their oath. But at this day they are appointed either in the law-day of that precinct wherein they serve, or else by the high constable in the sessions of the peace.

The King's Bench first instituted, and its jurisdiction.

THE sheriff's Tourn is a court very antient, incident to his office. At the first it was erected by the Conqueror, and called the King's Bench, appointing men studed in the knowledge of the laws to execute justice, as substitutes to him in his name, which men are to be named *justiciarii ad placita coram rege assignati*: one of them being *capitalis justiciarius*, called to his fellows; the rest in number as pleaseth the King; of late but three *justiciarii*, holden by patent. In this court every man above twelve years of age was to take his oath of allegiance to the King; if he were bound, then his lord to answer for him. In this court the constables were appointed and sworn; breakers of the peace punished by fine and imprisonment; the parties beaten or hurt recompensed upon complaints of damages; all appeals of murder, maim, robbery, decided; contempts against the crown, publick annoyances against the people, treasons and felonies, and all other matters of wrong betwixt party and party for lands and goods.

BUT the King seeing the realm grow daily more and more populous, and that this one court could not dispatch all, did first ordain that his marshal should keep a court, for controversies arising within the verge, which is within twelve miles of the chiefest tunnel of the court, which did but ease the King's Bench in matters only concerning debts, covenants, and such like, of those of the King's household only, never dealing in breaches of the peace, or concerning the crown by any other persons, or any pleas of lands.

Court of Marshalsea erected, and its jurisdiction within 12 miles of the chief tunnel, &c.

IN SOMUCH, as the King for farther ease having divided this kingdom into counties, and committing the charge of every county to a lord or earl, did direct, that those earls, within their limits, should look to the matter of the peace, and take charge of the constables, and reform public annoyances, and swear the people to the crown, and take pledges of the freemen for their allegiance; for which purpose the county did once every year keep a court, called the sheriff's Tourn; at which all the county (except women, clergy, children under twelve, and not aged above sixty) did appear to give or renew their pledges for allegiance. And the court was called, *Curia franci plegii*, a view of the pledges of freemen; or, *Tournus comitatus*.

AT which meeting or court there fell, by occasion of great assemblies, much blood-shed, scarcity of victuals, mutinies, and the like mischiefs, which are incident to the congregations of people, by which the King was moved to allow a subdivision of every county into hundreds, and every hundred to have a court, whereunto the people of every hundred should be assembled twice a year for survey of pledges, and use of that justice which was formerly executed in that grand court for the county; and the count or earl appointed a bailiff under him to keep the hundred court.

Sheriff's courts instituted upon the division of England into counties, &c. Likewise called Curia visus fra, pleg.

Subdivision of the county court into hundreds.

The charge of
the county ta-
ken from the
earls, and com-
mitted to the
sheriff.

BUT in the end, the Kings of this realm found it necessary to have all execution of justice immediately from themselves, by such as were more bound than earls to that service, and readily subject to correction for their negligence or abuse; and therefore took to themselves the appointing of a sheriff yearly in every county, calling them *Vicecomites*, and to them directed such writs and precepts for executing justice in the county, as fell out needful to have been dispatched, committing to the sheriff *custodiam comitatus*; by which the earls were spared of their toils and labours, and that was laid upon the sheriffs. So as now the sheriff doth all the King's business in the county, and that is now called the sheriff's Tourn; that is to say, he is judge of this grand court for the county, and also of all hundred courts not given away from the crown.

The sheriff is
judge of all
hundred
courts, &c.

County court
kept monthly
by the sheriff.

HE hath another court called the county court belonging to his office, wherein men may sue monthly for any debt or damages under 40*l.* and may have writs for to replevy their cattle distrained and impounded by others, and there try the cause of their distress; and by a writ called *injustices*, a man may sue for any sum; and in this court the sheriff by a writ called an *exigent* doth proclaim men sued in courts above to render their bodies, or else they be outlawed.

The office of
the sheriff.

THIS sheriff doth serve the King's writs of process, be they summons, attachments to compel men to answer to the law, and all writs of execution of the law, according to judgments of superior court, for taking of mens goods, lands, or bodies, as the cause requireth.

Hundred
courts to
whom at first
granted.

THE hundred courts were most of them granted to religious men, noblemen, and others of great place. And also many men of good quality have attained by charter, and some by usage within manors of their own, liberty of keeping law-

law-days, and to use there justice appertaining to a law-day.

WHOSOEVER is lord of the hundred court, is to appoint two high constables of the hundred, and also is to appoint in every village a petty constable with a tithing-man to attend in his absence, and to be at his commandment when he is present in all services of his office for his assistance.

THERE have been by use and statute law (besides surveying of the pledges of freemen, and giving the oath of allegiance, and making constables) many additions of powers and authority given to the stewards of leets and law-days to be put in use in their courts; as for example, they may punish inn-keepers, victuallers, bakers, butchers, poulterers, fishmongers, and tradesmen of all sorts, selling with under-weights or measures, or at excessive prices, or things unwholesome, or ill made in deceit of the people. They may punish those that do stop, straiten, or annoy the highways, or do not according to the provision enacted, repair or amend them, or divert water-courses, or destroy fry of fish, or use engines, or nets to take deer, conies, pheasants, or partridges, or build pigeon-houses; except he be lord of the manor, or parson of the church. They may also take presentment upon oath of the twelve sworn jury before them of all felonies; but they cannot try the malefactors, only they must by indenture deliver over those presentments of felony to the judges, when they come their circuits into that county. All those courts before mentioned are in use, and exercised as law at this day, concerning the sheriff's law-days and leets, and the offices of high constables, petty constables, and tithing-men; howbeit, with some further additions by statute laws, laying charge upon them for taxation for poor, for soldiers,

What matters
they enquire of
in leets and
law-days.

USE OF THE LAW.

and the like, and dealing without corruption, and the like.

Conservators
of the peace by
writ for term
of life, or at
the King's
pleasure.

What their of-
fice was.

CONSERVATORS of the peace were in antient times certain, which were assigned by the King to see the peace maintained, and they were called to the office by the King's writ, to continue for term of their lives, or at the King's pleasure.

FOR this service, choice was made of the best men of calling in the country, and but few in the shire. They might bind any man to keep the peace, and to good behaviour, by recognizance to the King with sureties, and they might by warrant send for the party, directing their warrant to the sheriff or constable, as they please, to arrest the party and bring him before them. This they used to do, when complaint was made by any that he stood in fear of another, and so took his oath; or else, where the conservator himself did, without oath or complaint, see the disposition of any man inclined to quarrel and breach of the peace, or to mis-behave himself in some outragious manner of force or fraud: there by his own discretion he might send for such a fellow, and make him find sureties of the peace, or of his good behaviour, as he should see cause; or else commit him to the gaol if he refused.

Conservators
of the peace by
virtue of their
office.

THE judges of either bench in *Westminster*, barons of the exchequer, master of the rolls, and justices in eire and assizes in their circuits, were all without writ conservators of the peace in all shires of *England*, and continue to this day.

Justices of
peace ordained
in lieu of con-
servators.
Power of pla-
cing delegated
to the Chan-
cellor.

BUT now at this day conservators of the peace are out of use, and in lieu of them there are ordained justices of peace, assigned by the King's commissions in every county, which are moveable at the King's pleasure; but the power of placing and displacing justices of the peace is by use delegated from the King to the Chancellor.

THAT

THAT there should be justices of peace by commissions, it was first enacted by a statute made in *Edw. III.* and their authority augmented by many statutes made since in every King's reign.

THEY are appointed to keep four sessions every year; that is, every quarter one. These sessions are a sitting of the justices to dispatch the affairs of their commissions. They have power to hear and determine in their sessions, all felonies, breaches of the peace, contempts and trespasses, so far as to fine the offender to the crown, but not to award recompence to the party grieved.

To fine offenders to the crown, but not to recompense the party grieved. Parl. stat. 17 R. 2. cap. 10. &c v. Dyer 69. b. Ils ont poier d'enquérir de murder car. ce Felon.

THEY are to suppress riots and tumults, to restore possessions forcibly taken away, to examine all felons apprehended and brought before them; to see impotent poor people, or maimed soldiers provided for, according to the laws; and rogues, vagabonds, and beggars punished. They are both to license and suppress ale-houses, badgers of corn and victuals, and to punish fore-stallers, regrators, and engrossers.

Authority of the Justices of peace, &c.

THROUGH these, in effect, run all the county services to the crown, as taxations of subsidies, mustering men, arming them, and levying forces, that is done by a special commission or precept from the King. Any of these justices by oath taken by a man, that he standeth in fear that another man will beat him, or kill him, or burn his house, are to send for the party by warrant of attachment directed to the sheriff or constable, and then to bind the party with sureties by recognizance to the King to keep the peace, and also to appear at the next sessions of the peace; at which next sessions, when every justice of peace hath therein delivered all their recognizances so taken, then the parties are called, and the cause of binding to the peace examined, and both parties being heard, the whole bench is to

Beating, killing, burning of houses.

Attachments for surety of the peace.

Recognizance of the peace delivered by the justices at their sessions.

determine as they see cause, either to continue the party so bound, or else to discharge him.

Quarter-sessions held by the justices of the peace.

THE justices of peace in their sessions are attended by the constables and bailiffs of all hundreds and liberties within the county, and by the sheriff or his deputy, to be employed as occasion shall serve in executing the precepts and directions of the court. They proceed in this sort; the sheriff doth summon twenty-four freeholders, discreet men of the said county, whereof some sixteen are selected and sworn, and have their charge to serve as the grand jury, the party indicted is to traverse the indictment, or else to confess it, and so submit himself to be fined as the court shall think meet (regard had to the offence) except the punishment be certainly appointed (as often it is) by special statutes.

The authority of justices of peace over their sessions. THE justices of peace are many in every county, and to them are brought all traitors, felons, and other malefactors of any sort upon their first apprehension; and that justice to whom they are brought examineth them, and heareth their accusations, but judgeth not upon it; only if he find the suspicion but light, then he taketh bond with sureties of the accused to appear either at the next assizes, if it be a matter of treason or felony; or else at the quarter-sessions, if it be concerning riot or mis-behaviour, or some other small offence. And he also then bindeth to appear those that give testimony and prosecute the accusation, all the accusers and witnesses, and so setteth the party at large. And at the assizes or sessions (as the case falleth out) he certifieth the recognizances taken of the accused, accusers, and witnesses, who being there are called, and appearing, the cause of the accused is debated according to law for his clearing or condemning.

BUT if the party accused seem, upon pregnant matter in the accusation, and to the justice to be guilty, and the offence heinous, or the offender taken

taken with the manner, then the justice is to commit the party by his warrant called a *mittimus*, to the goaler of the common goal of the county, there to remain until the assizes. And then the justice is to certify his accusation, examination, and recognizance taken for the appearances and prosecution of the witnesses, so as the judges may, when they come, readily proceed with him as the law requireth.

THE judges of the assizes as they be now become into the place of the antient justices in eyre, called *iustificarii itinerantes*, which in the prime Kings after the Conquest, until H. III. time especially, and after in lesser measure even to R. II. time, did execute the justice of the realm; they began in this sort.

Judges of assizes in place of the antient judges in eyre
Temp. R. II.

THE King, not able to dispatch business in his own person, erected the court of King's Bench; that not able to receive all, nor meet to draw the people all to one place, there were ordained counties, and the sheriffs tourns, hundred courts, and particular leets, and law-days, as before mentioned, which dealt only with crown matters for the publick; but not the private titles of lands, or goods, nor the trial of grand offences of treasons and felonies, but all the counties of the realm were divided into six circuits. And two learned men well read in the laws of the realm, were assigned by the King's commission to every circuit, and to ride twice a year through those shires allotted that circuit, making proclamation beforehand, a convenient time, in every county, of the time of their coming, and place of their sitting, to the end the people might attend them in every county of that circuit.

King's Bench,
marshal's
court, county
court, sheriffs
tourns, hun-
dred leets, and
law-days, dealt
only in crown
matters; iusti-
ces in cyre
dealt in private
titles of lands
or goods, and
in all treasons
and felonies,
which the
county courts
meddle not in.

THEY were to stay three or four days in every county, and in that time all the causes of that county were brought before them by the parties grieved, and all the prisoners of the said goal in

USE OF THE LAW.

every shire, and whatsoever controversies arising concerning life, lands, or goods.

The authority of judges in eyre, translated to justices of assize.

Justices of assize much lessened by the court of Common Pleas, erected in H. III. time.

Justices of assize sit by five commissions.

Oyer and terminer, in which the judges are of the quorum, &c.

Goal-delivery directed only to the judges and clerk of the assize.

THE authority of these judges in eyre is in part translated by act of parliament to justices of assize, which be now the judges of circuits, and they to use the same course that justices in eyre did, to proclaim their coming every half year, and the place of their sitting.

THE business of the justices in eyre, and of the justices of assize at this day is much lessened, for that in H. III. time there was erected the court of Common Pleas at Westminster, in which court have been ever since, and yet are, begun and handled the great suits of lands, debts, benefices and contracts, fines for assurance of lands and recoveries, which were wont to be either in the King's Bench, or else before the justices in eyre. But the statute of *Mag. Chart. cap. 11. 5.* is negative against it, viz. *Communia placita non sequantur curiam nostram, sed teneantur in aliquo loco certo;* which *locus certus* must be the Common Pleas; yet the judges of circuits have now five commissions by which they sit.

THE first is a commission of oyer and terminer, directed unto them, and many others of the best account, in their circuits; but in this commission the judges of assize are of the Quorum, so as without them there can be no proceeding.

THIS commission giveth them power to deal with treasons, murders, and all manner of felonies and misdemeanors whatsoever; and this is the largest commission that they have.

THE second is a commission of goal-delivery, that is only to the judges themselves, and the clerk of the assize associate: and by this commission they are to deal with every prisoner in the goal, for what offence soever he be there, and to proceed with him according to the laws of the realm, and the quality of his offence; and they cannot by this commission do any thing concerning

cerning any man, but those that are prisoners in the goal. The course now in use of execution of this commission of goal-delivery, is this. There is no prisoner but is committed by some justice of peace, who before he committed him took his examination, and bound his accusers and witnesses to appear and prosecute at the goal-delivery. This justice doth certify these examinations and bonds, and thereupon the accuser is called solemnly into the court, and when he appeareth, he is willed to prepare a bill of indictment against the prisoner, and go with it to the grand jury, and give evidence upon their oaths, he and the witnesses; which he doth: and then the grand jury write thereupon either *billa vera*, and then the prisoner standeth indicted, or else *ignoramus*, and then he is not touched. The grand jury deliver these bills to the judges in their court, and so many as they find indorsed *billa vera*, they send for those prisoners, then is every man's indictment put and read to him, and they ask him whether he be guilty or not: if he say Guilty, his confession is recorded; if he say Not guilty, then he is asked how he will be tried; he answereth, By the country. Then the sheriff is commanded to return the names of twelve freeholders to the court, which freeholders be sworn to make true delivery between the King and the prisoner; and then the indictment is again read, and the witnesses sworn to speak their knowledge concerning the fact, and the prisoner is heard at large what defence he can make, and then the jury go together and consult. And after a while they come in with a verdict of Guilty or Not guilty, which verdict the judges do record accordingly. If any prisoner plead Not guilty upon the indictment, and yet will not put himself to trial upon the jury (or stand mute) he shall be pressed.

THE judges, when many prisoners are in the goal,

The manner of
the proceed-
ings of the
judges of cir-
cuits.
Of the judges
for the goal-
delivery.

USE OF THE LAW.

goal, do in the end, before they go, peruse every one. Those that were indicted by the grand jury, and found Not guilty by the select jury, they judge to be quitted, and so deliver them out of the goal. Those that are found Guilty by both juries, they judge to death, and command the sheriff to see execution done. Those that refuse trial by the country, or stand mute upon the indictment, they judge to be pressed to death: some, whose offences are pilfering under twelve pence value, they judge to be whipped. Those that confess their indictments, they judge to death, whipping, or otherwise, as their offence requireth. And those that are not indicted at all, but their bill of indictment returned with *ignoramus* by the grand jury, and all other in the goal, against whom no bills at all are preferred, they do acquit by proclamation out of the goal; that one way or other they rid the goal of all the prisoners in it. But because some prisoners have their books, and be burned in the hand, and so delivered, it is necessary to shew the reason thereof. This having their books is called their clergy, which in antient time began thus.

Books allowed
to clergy, &c.

FOR the scarcity of the clergy in the realm of England, to be disposed in religious houses, or for priests, deacons, and clerks of parishes, there was a prerogative allowed to the clergy, that if any man, that could read as a clerk, were to be condemned to death, the bishop of the diocese might if he would, claim him as a clerk, and he was to see him tried in the face of the court.

WHETHER he could read or not, the book was prepared and brought by the Bishop, and the judge was to turn to some place as he should think meet and if the prisoner could read, then the Bishop was to have him delivered over unto him, to dispose of in some places of the clergy, as he should think meet: but if either the Bishop would not demand him, or that the prisoner could not read then was he to be put to death.

AN

AND this clergy was allowable in the ancient ^{Clergy allowed} times and law, for all offences, whatsoever they were, except treason, and the robbing of churches ^{in all offences, except treason and robbing of churches; now taken away,} of their goods and ornaments. But by many statutes made since, the clergy is taken away for ^{1. In murder.} murder, burglary, robbery, purse-cutting, horse-stealing, and diverse other felonies, particularized ^{2. In burglary.} by the statutes to the judges; and lastly, by a ^{3. Robbery.} statute made 18 Elizabeth, the judges themselves ^{4. Purse-cutting.} are appointed to allow clergy to such as can read, ^{5. Horse-stealing, and in diverse other offences. By the stat. of 18 Eliz.} being not such offenders, from whom clergy is ^{judges are to allow cler} taken away by any statute, and to see them ^{gy, and to see them burned in} turned in the hand, and so discharge them, without delivering them to the Bishop; howbeit, the ^{the hand, and to discharge the prisoners without the Bishop.} Bishop appointeth the deputy to attend the judges with a book, to try whether they can read or not.

THE third commission, that the judges of circuits have, is a commission directed to themselves only, and the clerk of assize to take assizes, by which they are called justices of assize; and the office of those justices is to do right upon writs called assizes, brought before them by such as are wrongfully thrust out of their lands. Of which number of writs there was far greater store brought before them in ancient times than now; for that mens seizins and possessions are sooner recovered by sealing leafes upon the ground, and bringing an *ejectione firmæ*, and trying their might so, than by the long suits of assizes.

THE fourth commission is a commission to take *Nisi Prius*, directed to none but to the judges themselves and their clerks of assizes, by which they are called justices of *Nisi Prius*. These *Nisi Prius* happen in this sort; when a suit is begun ^{4. Commission to take Nisi Prius, directed to two judges and the clerk of the assize.} by any matter in one of the three courts, the King's Bench, Common Pleas, or the Exchequer should be above, and the parties in their pleadings do ^{AN} differ in a point of fact; as for example, if in an action of debt upon obligation the defendant denies

USE OF THE LAW.

nies the obligation to be his debt; or in any action of trespass grown for taking away goods, the defendant denieth that he took them, or in action of the case for slanderous words, the defendant denieth that he spake them, &c.

THEN the plaintiff is to maintain and prove that the obligation is the defendant's deed, that he either took the goods, or spake the words; upon which denial and affirmation the law saith, that issue is joined betwixt them, which issue of the fact is to be tried by a jury of twelve men of the county, where it is supposed by the plaintiff to be done, and for that purpose the judges of the court do award a writ of *Venire facias* in the King's name to the sheriff of that county, commanding him to cause four and twenty discreet freeholders of his county, at a certain day, to try this issue so joined, out of which four and twenty, only twelve are chosen to serve. And that double number is returned, because some may make default, and some be challenged upon kindred, alliance, or partial dealing.

THESE four and twenty the sheriff doth name and certify to the court, and withal, that he hath warned them to come at the day according to their writ. But because at the first summons there falleth no punishment upon the four and twenty if they come not, they very seldom or never appear upon the first writ; and upon their default there is another writ * returned to the sheriff,

* *Distringas.*
The manner of proceeding of justices of circuits. The course the judges hold in the taking of *Nisi prius*.
commanding him to distrain them by their lands to appear at a certain day appointed by the writ, which is the next term after, *Nisi prius justiciariis nostri ad assisas capiendas venerint*, &c. of which words the writ is called a *Nisi Prius*, and the judges of the circuit of that county in that vacation, and mean time, before the day of appearance appointed for the jury above, here by their commission of *Nisi Prius*, have authority to take the appearance of the jury in the county before them,

hem, and there to hear the witnesses and proofs
in both sides, concerning the issue of fact, and
to take the verdict of the jury, and against the
day they should have appeared above, to return
the verdict read in the court above, which return
is called a *Postea*.

Postea.

AND upon this verdict, clearing the matter in
fact, one way or other, the judges above give
judgment for the party for whom the verdict is
found, and for such damages and costs as the ju-
dges do assess.

By those trials called *Nisi Prius*, the juries and
the parties are eased much of the charge they
would be put to, by coming to *London* with their
evidences and witnesses; and the courts of *West-
minster* are eased of much trouble they should
have, if all the juries for trials should appear and
try their causes in those courts; for those courts
have little leisure now: though the juries come
not up, yet in matters of great weight, or where
the title is intricate or difficult, the judges above,
on information to them, do retain those causes
be tried there, and the juries do at this day,
such causes, come to the bar at *Westminster*.

THE fifth commission that the judges in their
cuits do sit by, is the commission of the peace
in every county of their circuit. And all the
justices of the peace, having no lawful impediment,
are bound to be present at the assizes to
attend the judges, as occasion shall fall out: if
they make default, the judges may set a fine upon
them at their pleasure and discretions. Also the
sheriff in every shire through the circuit, is to
attend in person, or by a sufficient deputy al-
ways sent by the judges, all that time they be within
the county, and the judges may fine him if he
fails to appear before them; and the judges above may also fine
the sheriff, for not returning, or not sufficient re-
turning of writs before them.

Commission
is a commission
of the peace.
The justices of
the peace and
the sheriff are
to attend the
judges in their
county.

Property in lands, how gotten or transferred.

1. By entry.
2. By descent.
3. By escheat.
4. Most usually by conveyance.

Of the property of lands to be gained by entry.

All lands in England were the Conqueror's, and held of him, except
1. Religious and church lands.
2. The lands of the men of Kent

Land left by the sea belongeth to the King.

1. PROPERTY by entry is, where a man findeth a piece of land that no other possesseth or hath title unto, and he that so findeth it doth enter, this entry gaineth a property ; this law seemeth to be derived from this text, *Terra dedit filiis hominum*, which is to be understood, to those that will till and manure it, and so make it yield fruit : and that is he that entereth into it, when no man had it before. But this manner of gaining lands was in the first days, and is not now in use in *England*, for that by the conquest, all the land of this nation was in the Conqueror's hand, and appropriated unto him ; except religious and church lands, and the lands in *Kent*, which by composition were left to the former owners, the Conqueror found them ; so that no man but the bishopricks, churches, and the men of *Kent* can at this day make any greater title than from the conquest, to any lands in *England* ; and lands possessed without any such title, are in the crown, and not in him that first entereth, as it is land left by the sea ; this land belongeth to the King, and not to him that hath the lands next adjoining, which was the ancient sea-banks ; this is to be understood of the inheritance of land, viz. that the inheritance cannot be gained by the first entry. But an estate for another man's life by out-laws, may at this day be gotten by entry. As a man called *A*. having land conveyed unto him for the life of *B*. dieth without leaving any estate of it, there, whosoever first entereth into the land after the decease of *A*. getteth the property in the land for time of the con-

tinuance of the estate which was granted to *A.* for the life of *B.* which *B.* yet liveth, and therefore the said land cannot revert till *B.* die. And to the heir of *A.* it cannot go, for that it is not any estate of inheritance, but only an estate for another man's life; which is not descendable to the heir, except he be specially named in the grant, *viz.* to him and his heirs. As for the executors of *A.* they cannot have it, for it is not an estate testamentary, that it should go to the executors as goods and chattels should, so as in truth no man can entitle himself unto those lands; and therefore the law preferreth him that first entereth, and he is called *occupans*, and shall hold it *Occupancy*. During the life of *B.* but must pay the rent, perform the conditions, and do no waste: and he may by deed assign it to whom he please in his life-time. But if he die before he assign it over, then it shall go again to whomsoever first entereth and holdeth; and so all the life of *B.* so often as it shall happen.

LIKewise, if any man doth wrongfully enter into another man's possession, and put the right owner of the freehold and inheritance from it; thereby getteth the freehold and inheritance disfeisian, and may hold it against all men, but him that hath right, and his heirs, and is called a disseisor. Or if any one die seised of lands, and before his heir doth enter, one that hath no right enter into the lands, and holdeth them from the right heir, he is called an abator, and is lawfull owner against all men but the right heir.

AND if such person abator or disseisor (so as he hath quiet possession five years next after the disseisin) do continue their possession, and die seised, and the land descend to his heir, without they have gained the right to the possession of the land against him that hath right, till he recover it by fit action real at the common law. And if it be not sued for at the common law, within

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within threescore years after the disseisin, or abatement committed, the right owner hath lost his right by that negligence. And if a man hath diverse children, and the elder, being a bastard, doth enter into the land, and enjoyeth it quietly during his life, and dieth thereof so seised, his heirs shall hold the land against all the lawful children, and their issues.

Property of
lands by de-
scent.

Of descent :
three rules.

Brother or sis-
ter of the half
blood shall not
inherit to his
brother or sis-
ter, but only as
a child to his
parents.

PROPERTY of lands by descent is, where a man hath lands of inheritance and dieth, not disposing of them, but leaving it to go (as the law casteth it) upon the heir. This is called a descent of law, and upon whom the descent is to light, is the question. For which purpose, the law of inheritance preferreth the first child before all others, and amongst children the male before the female ; and amongst males the first born. If there be no children, then the brother ; if no brother, then sisters ; if neither brothers nor sisters, then uncles, and for lack of uncles, aunts ; if none of them, then cousins in the nearest degree of consanguinity, with these three rules of diversities.

1. That the eldest male shall solely inherit ; but if it come to females, then they being all in an equal degree of nearness shall inherit all together, and are called parceners, and all they make but one heir to the ancestor.

2. That no brother nor sister of the half blood shall inherit to his brother or sister, but as a child to his parents : as for example, if a man have two wives, and by either wife a son, the eldest son over living his father is to be preferred to the inheritance of the father being fee-simple ; but if he entereth and dieth without a child, the brother shall not be his heir because he is of the half blood to him, but the uncle of the eldest brother or sister of the whole blood : yet if the eldest brother had died, or had not entered in the life of the father, either by such entry or conveyance, then the youngest brother should inherit the land that the father had himself although it were a child by the second wife,

fore any daughter by the first. The third rule about descents. That land purchased so by the party himself that dieth, is to be inherited; first, by the heirs of the father's side, then if he have none of that part, by the heirs of the mother's side. Descents
But lands descended to him from his father or mother, are to go to that side only from which they came, and not to the other side.

THOSE rules of descent mentioned before are to be understood of fee-simples, and not of entailed lands, and those rules are restrained by some particular customs of some particular places: as namely, the customs of *Kent*, that every male of equal degree of childhood, brotherhood, or kindred, shall inherit equally (as daughters shall being parceners;) and in many borough towns of *England*, the custom alloweth the youngest son to inherit, and so the youngest daughter. The custom of *Kent* is called *Gavelkind*. The custom of boroughs, *Burgh-English*.

Customs of certain places.

AND there is another note to be observed in fee-simple inheritance, and that is, that every heir having fee-simple land or inheritance, be it by common law or by custom, of either *Gavelkind* or *Burgh-English*, is chargeable so far forth as the value thereof extendeth, with the binding acts of the ancestors from whom the inheritance descendeth; and these acts are collateral incumbrances, and the reason of this charge is, *Qui sentit commodity, sentire debet & incommodity five onus*. As for example, if a man bind himself and his heirs in an obligation, or do covenant by writing for him and his heirs, or do grant an annuity for him and his heirs, or do make a warranty of land, binding him and his heirs to warranty: in all these cases the law chargeth the heir after the death of the ancestor with this obligation, covenant, annuity, and warranty; yet with these three cautions: first, that the party must by special name bind himself and his heirs, or covenant, grant and warrant;

Every Heir having land is bound by the binding acts of his ancestors, if he be named.

Dyer 114.
Plowd.

Dyer 149.
Plowd.

Day and Peppys
case.

Heir charged
for his false
plea.

Property of
lands by es-
cheat.

rant for himself and his heirs; otherwise the heir is not to be touched. Secondly, that some action must be brought against the heir, whilst the land or other inheritance resteth in him unaliened away: for if the ancestor die, and the heir, before an action be brought against him upon those bonds, covenants, or warranties, do alien away the land, then the heir is clean discharged of the burden; except the land was by fraud conveyed away of purpose to prevent the suit intended against him. Thirdly, that no heir is farther to be charged than the value of the land descended unto him from the same ancestor that made the instrument of charge, and that land also, not to be sold out-right for the debt, but to be kept in extent, and at a yearly value, until the debt or damage be run out. Nevertheless, if an heir that is sued upon such a debt of his ancestor do not deal clearly with the court when he is sued, that is, if he come not in immediately, and by way of confession set down the true quantity of his inheritance descended, and so submit himself therefore, as the law requireth, then that heir that otherwise demeaneth himself, shall be charged of his own lands or goods, and of his money, for this deed of his ancestor. As for example; if a man bind himself and his heirs in an obligation of one hundred pounds, and dieth leaving but ten acres of land to his heir, if his heir be sued upon the bond, and cometh in, and denieth that he hath any lands by descent; and it is found against him by the verdict that he hath ten acres, this heir shall be now charged by his false plea of his own lands, goods and body, to pay the hundred pound, although the ten acres be not worth ten pound.

PROPERTY of lands by escheat, is where the owner died seised of the lands in possession without child or other heir, thereby the land, for lack of other heir, is said to escheat to the lord

of

of whom it is holden. This lack of heir happeneth principally in two cases: First, where the land's owner is a bastard. Secondly, where he is attainted of felony or treason. For neither can a bastard have any heir, except it be his own child, nor a man attainted of treason, although it be his own child.

UPON attainerd of treason the King is to have the land, although he be not the lord of whom it is held, because it is a royal escheat. But for felony it is not so, for there the King is not to have the escheat, except the land be holden of him: and yet where the land is not holden of him, the King is to have the land for a year and a day next ensuing the judgment of the attainerd, with a liberty to commit all manner of waste all that year in houses, gardens, ponds, lands, and woods.

IN these escheats two things are especially to be observed; the one is, the tenure of the lands, because it directeth the person to whom the escheat belongeth, *viz.* the lord of the manor of whom the land is holden. 2. The manner of such attainerd which draweth with it the escheat. Concerning the tenures of lands, it is to be understood, that all lands are holden of the crown either mediately or immediately, and that the escheat appertaineth to the immediate lord, and not to the mediate. The reason why all land is holden of the crown immediately, or by mesne lords, is this.

THE Conqueror got by right of conquest all the land of the realm into his own hands in demesne, taking from every man all estate, tenure, property and liberty of the same, (except religious and church lands, and the land in Kent:) and still as he gave any of it out of his own hand, he reserved some retribution of rents, or services, or both, to him and to his heirs; which reservation is that which is called the tenure of land.

of

Two causes of
escheat.
1. Bastardy.
2. Attainerd of
treason, felonyn.

Attainerd of
treason enti-
tleteth the King,
though lands
be not holden
of him: other-
wise in attainer-
der of felony,
&c. for there
the King shall
have but an-
num, diem &
vastum.

In escheats;
1. The tenure.
2. The manner
of the attain-
der.

The Conque-
ror got all the
lands of the
realm into his
hands, and re-
served rents
& services.

Knight-service in capite first instituted. The reservations in knight-service.

1. Marriage of the wards.
2. Horse for service.
3. Homage and fealty.
4. Primer seisin. The policy of the Conqueror in the reservation of services. Reservation that his tenant should keep a horse of service, and serve upon him himself, when the King went to war.

IN which reservation he had four institutions, exceeding politick and suitable to the state of a conqueror.

I. SEEING his people to be part *Normans*, and part *Saxons*, the *Normans* he brought with him, the *Saxons* he found here; he bent himself to conjoin them by marriages in amity, and for that purpose ordains, that if those of his nobles, knights, and gentlemen, to whom he gave great rewards of lands should die, leaving their heir within age, a male within twenty-one, and a female within fourteen years, and unmarried, then the King should have the bestowing of such heirs in marriage in such a family, and to such persons as he should think meet; which interest of marriage went still implied, and doth at this day in every tenure called knight-service.

THE second was, to the end that his people should still be conserved in warlike exercises and able for his defence. When therefore he gave any good portion of lands, that might make the party of abilities or strength, he withal reserved this service, that that party and his heirs having such lands, should keep a horse of service continually, and serve upon him himself when the King went to wars; or else having impediment to excuse his own person, should find another to serve in his place: which service of horse and man, is a part of that tenure called knight-service at this day.

BUT if the tenant himself be an infant, the King is to hold this land himself until he come to full age, finding him meat, drink, apparel, and other necessaries, and finding a horse and a man with the overplus, to serve in the wars as the tenant himself should do if he were at full age.

BUT if this inheritance descend upon a woman that cannot serve by her sex, then the King is not to have the lands, she being of fourteen years

years of age, because she is then able to have an husband that may do the service in person.

* THE third institution, that upon every gift of land the King reserved a vow and an oath to bind the party to his faith and loyalty; that vow was called homage, the oath fealty. Homage is to be done kneeling, holding his hands between the knees of the lord, saying in the *French* tongue, I become your man of life and limb, and of earthly honour. Fealty is to take an oath upon a book, that he will be a faithful tenant to the King, and do his service, and pay his rents according to his tenure.

† THE fourth institution was, that for recognition of the King's bounty by every heir succeeding his ancestor in those knight-service lands, the King should have *primer seisin* of the lands, which is one year's profit of the lands; and until this be paid, the King is to have possession of the land, and then to restore it to the heir; which continueth at this day in use, and is the very cause of suing livery, and that as well where the heir hath been in ward as otherwise.

THESE before-mentioned be the rights of the tenure, called knight-service in *capite*, which is as much as to say, tenure *de persona regis*, and *caput* being the chiefest part of the person, it is called a tenure in *capite*, or in chief.

* Aid money to make the King's eldest son a knight, or to marry his eldest daughter, is likewise due to his Majesty from every one of his tenants in knight-service, that hold by a whole fee 20*s.* and from every tenant in socage, if his land be worth twenty pound *per ann.* 20*s.* *Vide N. 3.*

† Escuage was likewise due unto the King from his tenant by knight-service: when his Majesty made a voyage royal to war against another nation, those of his tenants that did not attend him there for forty days with horses and furniture fit for service, were to be assessed in a certain sum by act of parliament; to be paid unto his Majesty, which assessment is called escuage.

3. Institution
of the Conquer-
or was, that
his tenants by
knight service
vow,
1. Homage.
2. Fealty.

4. Institution
was for recogni-
tion of the
King's bounty,
every heir to
pay one year's
profit of the
lands, called
primer seisin.

Knight service
in capite is a
tenure *de per-
sona regis*.

Tenants by
grand serjeanty
were to pay
relief at the
full age of every
heir, which
was one year's
value of the
lands so held,
ultra repris.
Grand serjeanty.

Petty serjeanty.

The institution
of socage in
capite, and that
it is now turned
into money
rents.

AND it is also to be noted, that as this tenure in *capite* by knight-service generally was a great safety to the crown, so also the Conqueror instituted other tenures in *capite* necessary to his estate; as namely, he gave divers lands to be holden of him by some special service about his person, or by bearing some special office in his house, or in the field, which have knight-service and more in them, and these he called tenures by grand serjeanty. Also he provided upon the first gift of lands, to have revenues by continual service of ploughing his land, repairing his houses, parks, pales, castles, and the like. And sometimes to a yearly provision of gloves, spurs, hawks, horses, hounds and the like; which kind of reservations are called also tenures in chief, or in *capite* of the King; but they are not by knight-service, because they required no personal service, but such things as the tenants may hire another to do, or provide for his money. And this tenure is called a tenure by socage in *capite*, the word *socagium* signifying the plough; howbeit in this latter time, the service of ploughing the land is turned into money rent, and so of harvest works, for that the Kings do not keep their demesne in their own hands, as they were wont to do; yet what lands were *de antiquo dominio corona*, it well appeareth in the records of the exchequer called the book of *Doomsday*. And the tenants by ancient demesne, have many immunities and privileges at this day, that in ancient times were granted unto those tenants by the crown; the particulars whereof are too long to set down.

THESE tenures in *capite*, as well that by *socage*, as the others by knight-service, have this property; that the tenants cannot alien their lands without license of the King; if they do, the King is to have a fine for the contempt, and may seize the land, and retain it until the fine be paid.

paid. And the reason is, because the King would have a liberty in the choice of his tenant, so that no man should presume to enter into those lands, and hold them (for which the King was to have those special services done him) without the King's leave; this license and fine as it is now digested is easy and of course.

THERE is an office called the office of alienation, where any man may have a license at a reasonable rate, that is, at the third part of one year's value of the land moderately rated. A tenant in *capite* by knight-service or grand serjeancy, was restrained by ancient statute, that he should not give nor alien away more of his lands, than that with the rest he might be able to do the service due to the King; and this is now out of use.

AND to this tenure by knight-service in chief, was incident that the King should have a certain sum of money called aid, due to be ratably levied amongst all those tenants proportionably to his lands, to make his eldest son a knight, or to marry his eldest daughter.

AND it is to be noted, that all those that hold lands by the tenure of socage in *capite* (although not by knight-service) cannot alien without his cense, and they are to sue livery, and pay *primer seisin*, but not to be in ward for body or land.

By example and resemblance of the King's policy in these institutions of tenures, the great men and gentlemen of this realm did the like so near as they could; as for example, when the King had given to any of them two thousand acres of land, this party purposing in this place to make his dwelling, or (as the old word is) his mansion-house, or his manor-house, did devise how he might make his land a complete habitation to supply him with all manner of necessaries; and for that purpose, he would give of the uttermost parts of those two thousand acres, 100 or 200

Office of alienation.
A license of alienation is the third part of one year's value of the land moderately rated.

Aid, what.
Tenants by knight-service in capite, paid it to make the King's eldest son a knight, or to marry his eldest daughter.

Tenants by socage in capite.

How manors were at first created.
Manors created by great men in imitation of the King in the institutions of tenures. A manere, the word manor.

Knight-service
tenure reserved
to common
persons.

Relief is £ l. to
be paid by eve-
ry tenant by
knight-service
to his lord, &c.

Socage tenure
reserved by the
lord.

acres, or more or less, as he should think meet, to one of his most trusty servants, with some reservation of rent to find a horse for the wars, and go with him when he went with the King to the wars, adding vow of homage, and the * oath of fealty, wardship, marriage, and relief. This relief is to pay five pound for every knight's fee, or after the rate for more or less at the entrance of every heir; which tenant so created and placed, was and is to this day called a tenant by knight-service, and not by his own person, but of his manors; of these he might make as many as he would. Then this lord would provide that the land which he was to keep for his own use, should be ploughed, and his harvest brought home, his house repaired, his park paled, and the like: and for that end he would give some lesser parcels to sundry others, of twenty, thirty, forty, or fifty acres: reserving the service of ploughing a certain quantity, or so many days of his land, and certain harvest works or days in the harvest to labour, or to repair the house, park pale, or otherwise, or to give him for his provision, capons, hens, pepper, cumin, roses, gilliflowers, spurs, gloves, or the like; or to pay him a certain rent, and to be sworn to be his faithful tenant, which tenure was called a socage tenure, and is so to this day, howbeit most of the ploughing and harvest services are turned into money rents.

Relief of te-
nant in socage,
one year's rent
and no ward-
ship, or other
profit upon the
dying of the
tenant,

† THE tenants in socage at the death of every tenant were to pay relief, which was not as knight-service is, five pound a knight's fee: But it was, and so is still, one year's rent of the land; and no wardship or other profit to the lord. The remainder of the two thousand acres he kept to

* Knight-service tenure created by the lord, is not a tenure by knight-service of the person of the lord, but of his manor.

† Aid money and escuage money is likewise due unto the lords of their tenants, *vide N. 3.*

himself, which he used to manure by his bond-men, and appointed them at the courts of his manor how they should hold it, making an entry of it into the roll of the remembrances of the acts of his court, yet still in the lord's power to take it away; and therefore they were called tenants at will, by copy of court-roll; being in truth bond-men at the beginning: but having obtained freedom of their persons, and gained a custom by use of occupying their lands, they now are called copyholders, and are so privileged, that the lord cannot put them out, and all through custom. Some copyholders are for lives, one, two, or three successively; and some inheritances from heir to heir by custom; and custom ruleth these estates wholly, both for widows estates, fines, heriots, forfeitures, and all other things.

Villenage or
tenure by copy
of court-roll.

MANORS being in this sort made at the first, reason was that the lord of the manor should hold a court, which is no more than to assemble his tenants together at a time by him to be appointed; in which court he was to be informed by oath of his tenants, of all such duties, rents, reliefs, wardships, copy-holds, or the like, that had happened unto him; which information is called a presentment, and then his bailiff to seize and distrain for those duties if they were denied or withheld, which is called a court-baron: and herein a man may sue for any debt or trespass under forty pound value, and the freeholders are to judge of the cause upon proof produced upon both sides. And therefore the freeholders of these manors, as incident to their tenures, do hold by suit of court, which is to come to the court, and there to judge between party and party in those petty actions; and also to inform the lord of duties, rents, and services unpaid to him from his tenants. By this course it is discerned who be the lords of lands, such as,

Court baron,
with the use of
it.

Suit to the
court of the
lord incident
to the tenure
of the free-
holders.

if

if the tenants die without heir, or be attainted of felony or treason, shall have the land by escheat.

What attainders shall give the escheat to the lord.
1. By judgment.
2. By verdict or confession.
3. By out-lawry, give the lands to the lord.
Of an attainer by out-lawry.

Now concerning what attainders shall give the escheat to the lord; it is to be noted, that it must either be by judgment of death given in some court of record against the felon found guilty by verdict, or confession of the felony, or it must be by out-lawry of him.

THE out-lawry groweth in this sort; a man is indicted for felony, being not in hold, so as he cannot be brought in person to appear and to be tried, insomuch that process of *capias* is therefore awarded to the sheriff, who not finding him, returneth, *non est inventus in balliva mea*; and thereupon another *capias* is awarded to the sheriff, who likewise not finding him maketh the same return; then a writ called an *exigent* is directed to the sheriff, commanding him to proclaim him in his county-court five several court-days, to yield his body; which if the sheriff do, and the party yield not his body, he is said, by the default, to be out-lawed, the coroners there adjudging him out-lawed, and the sheriff making the return of the proclamations, and of the judgment of the coroners upon the backside of the writ. This is an attainer of felony, whereupon the offender doth forfeit his lands by an escheat to the lord of whom they are holden.

Prayer of the clergy.

BUT note, that a man found guilty of felony by verdict or confession, and praying his clergy and thereupon reading as a clerk, and so burnt in the hand and discharged, is not attainted; because he by his clergy preventeth the judgment of death, and is called a clerk convict, who loseth not his lands, but all his goods, chattels, leafes, and debts.

He that standeth mute forfeith no lands, except for treason.

So a man indicted, that will not answer nor himself upon trial, although he be by this to have judgment of pressing to death, yet he doth forfeit no lands, but goods, chattels, leafes, and debts.

debts, except his offence be treason, and then he forfeiteth his lands to the crown.

So a man that killeth himself shall not lose his lands, but his goods, chattels, leases, and debts. He that killeth himself forfeiteth but his chattels. So of those that kill others in their own defence, or by misfortune.

A man that being pursued for felony, and flyeth for it, loseth his goods for his flying, although he return and is tried, and found not guilty of the fact. Flying for felony, a forfeiture of goods.

So a man indicted of felony, if he yield not his body to the sheriff until after the exigent of proclamation is awarded against him, this man doth forfeit all his goods for his long stay, although he be not found guilty of the felony; but none is attainted to lose his lands, but only such as have judgments of death by trial upon verdict, or their own confession, or that they be by judgment of the coroners outlawed, as before.

BESIDES the escheats of lands to the lords of whom they be holden for lack of heirs, and by attainder for felony (which only do hold place in fee-simple lands) there are also forfeiture of lands to the crown by attainder of treason; as namely, if one that hath entailed lands commit treason, he forfeiteth the profits of the lands for his life to the crown, but not to the lord.

AND if a man having an estate for life of himself, or of another, commit treason or felony, the whole estate is forfeited to the crown, but no escheat to the lord.

But a copy-hold, for fee-simple, or for life, is forfeited to the lord, and not to the crown; and if it be entailed, the lord is to have it during the life of the offender only, and then his heir is to have it.

THE custom of Kent is, that Gavelkind land is not forfeitable nor escheatable for felony; for they have an old saying; the father to the bough, and the son to the plough.

The wife loseth no dower, notwithstanding the husband be attainted of felony.

If the husband was attainted, the wife was to lose her thirds in cases of felony and treason, but yet she is no offender; but at this day it is holden by statute law, that she loseth them not for the husband's felony. The relation of these forfeits are these:

Attainer in felony or treason by verdict, confession or out-lawry, forfeith all they had from the time of the offence committed.

1. THAT men attainted of felony or treason, by verdict or confession, do forfeit all the lands they had at the time of their offence committed, and the King or the lord, whosoever of them hath the escheat or forfeiture, shall come in and avoid all leases, statutes, or conveyances done by the offender, at any time since the offence done. And so is the law clear also, if a man be attainted for treason by out-lawry; but upon attainer of felony by out-lawry, it hath been much doubted by the law books, whether the lord's title by escheat shall relate back to the time of the offence done, or only to the date or test of the writ of exigent for proclamation, whereupon he is outlawed; howbeit, at this day it is ruled, that it shall reach back to the time of his fact; but for goods, chattels, and debts, the King's title shall

And so it is upon an attainer of out-lawry; otherwise it is in the attainer by verdict, confession, and out-lawry, as to their relation for the forfeiture of goods and chattels. look no further back than to those goods, the party attainted by verdict or confession had at the time of the verdict and confession, given or made, and in out-lawries at the time of the exigent, as well in treasons as felonies: wherein it is to be observed, that upon the parties first apprehension, the King's officers are to seize all the goods and chattels, and preserve them together, suspending only so much out of them, as is fit

The King's officers to seize a felon's goods and chattels. for the sustentation of the person in prison, without any wasting, or disposing them until conviction; and then the property of them is in the crown, and not before.

A person attainted may purchase, but it shall be to the King's use.

It is also to be noted, that persons attainted for felony or treason, have no capacity in them to take, obtain or purchase, save only to the use of the King, until the party be pardoned. Yet the

party

party giveth not back his lands or goods, without a special patent of restitution, which cannot restore the blood without an act of parliament. So if a man have a son, and then is attainted of felony or treason, and pardoned, and purchaseth lands, and then hath issue another son, and dieth; the son he had before he had is pardon, although he be his eldest son, and the patent have the words of restitution to his lands, shall not inherit, but his second son shall inherit them, and not the first; because the blood is corrupted by the attainer, and cannot be restored by patent alone, but by act of parliament. And if a man have two sons, and the eldest is attainted in the life of his father, and dieth without issue, the father living, the second son shall inherit the father's lands; but if the eldest son have any issue, though he die in the life of his father, then neither the second son, nor the issue of the eldest, shall inherit the father's lands, but the father shall there be accounted to die without heir; and the land shall escheat, whether the eldest son have issue or not, afterward or before, though he be pardoned after the death of his father.

There can be no restitution in blood without act of parliament; but a pardon enbleth a man to purchase, and the heir begotten after shall inherit those lands.

Property of lands by conveyance, is first distributed into estates, for years, for life, in tail, and fee-simple.

THESE estates are created by word, by writing, or by record. For estates of years, which are commonly called leases for years, they are thus made; where the owner of the land agreeith with the other by word of mouth, that the other shall have, hold, and enjoy the land, to take the profits thereof for a time certain of years, months, weeks or days, agreed between them; and this is called a lease parol; such a lease may be made by writing poll or indented of devise, grant,

Property of land by conveyance divided into,
 1. Estates in fee.
 2. In tail.
 3. For life.
 4. For years.

USE OF THE LAW.

Leases for years, they go to the executors, and not to the heirs.

Leases are to be forfeited by attainder.

1. In treason.

2. Felony.

3. Premonire.

4. By killing himself.

5. For flying.

6. Standing out, &c.

7. By conviction.

8. Petty larceny. 9. Going beyond the sea without licence.

Extents upon stat. staple, merchant, or elegit. Wardship of body and lands are chattels, and forfeitable.

Lease for life how forfeitable.

Indorsement of livery, &c.

grant, and to farm let, and so also by fine of record; but whether any rent be reserved or no, it is not material. Unto these leases there may be annexed such exceptions, conditions, and covenants, as the parties can agree on. They are called chattels real, and are not inheritable by the heirs, but go to the executors, and administrators, and be saleable for debts in the life of the owner, or in the executors or administrators hands by writs of execution upon statutes, recognizances, judgments of debts or damages. They be also forfeitable to the crown by out-lawry, by attainder for treason, felony, or premonire, killing himself, flying for felony, although not guilty of the fact, standing out, or refusing to be tried by the country, by conviction of felony, by verdict without judgment, petty larceny, or going beyond the sea without licence.

THEY are forfeitable to the crown, in like manner as leases for years, or interest gotten in other mens lands, by extending for debt upon judgment in any court of record, statute merchant, statute staple, recognizances; which being upon statutes are called tenants by statute merchant, or staple the other tenants by elegit, and by wardship of body and lands: for all these are called chattel real, and go to the executors and administrators and not to the heirs; and are saleable and forfeitable as leases for years are.

LEASES for lives are also called free-holds they may also be made by word or writing. There must be livery and seisin given at the making of the lease by him, whom we call the lessor who cometh to the door, backside, or garden, if it be a house; if not, then to some part of the land, and there he expresseth, that he doth grant unto the taker, called the lessee, for term of his life and in seisin thereof, he delivereth to him a twig, or ring of the door: and if the lease be by writing, then commonly there is a note written

the backside of the lease, with the names of those witnesses who were present at the time of the livery of seisin made. This estate is not saleable by the sheriff for debt, but the land is to be extended for a yearly value, to satisfy the debt. It is not forfeitable by out-lawry, except in cases of felony, nor by any of the means before mentioned, of leases for years; saving in an attainder for felony, treason, premunire, and then only to the crown, and not to the lords by escheat.

Lease for life
not to be sold
by the sheriff
for debt, but
extended
yearly,

AND though a nobleman or other have liberty by charter, to have all felons good; yet a tenant holding for term of life, being attainted of felony, doth forfeit unto the King, and not to this nobleman.

A man that hath bona felon, by charter shall not have the estate, if leaser for life be attainted.

If a man have an estate in lands for another man's life, and dieth; this land cannot go to his heir, nor to his executors, but to the party that first entreth; and he is called an occupant, as before hath been declared.

A lease for years or for life may be made also Of estate tails,
by fine of record, or bargain and sale, or cove- and how such
tenant to stand seized upon good considerations of an estate may
be limited.
marriage, or blood; the reasons whereof are here-
after expressed.

ENTAILS of lands are created by a gift, with every and seisin to a man, and to the heirs of his body; this word (body) making the entail, may be demonstrated and restrained to the males or females, heirs of their two bodies, or of the body of either of them, or of the grandfather or lessor.

ENTAILS of lands began by a statute made in By the stat. of West. I. made
d. I. time, by which also they are so much strengthened, as that the tenant in tail could not estates in tail
put away the land from the heir by any act of strengthened,
conveyance or attainer; nor let it, nor incurber that they were
longer than his own life. were so
not forfeitable
by an attainer.

BUT

USE OF THE LAW.

The great inconvenience
that ensued
thereof.

BUT the inconvenience thereof was great, for by that means, the land being so sure tied upon the heir as that his father could not put it from him, it made the son to be disobedient, negligent, and wasteful; often marrying without the father's consent, and to grow insolent in vice, knowing that there could be no check of disinheriting him. It also made the owners of the land less fearful to commit murders, felonies, treasons, and man-slaughters; for that they knew none of these acts could hurt the heir of his inheritance. It hindered men that had entailed lands, that they could not make the best of their lands by fine and improvement, for that none upon so uncertain an estate as for term of his own life, would give him a fine of any value, nor lay any great stock upon the land, that might yield rent improved.

The prejudice
the crown re-
ceived thereby.

LASTLY, those entails did defraud the crown, and many subjects of their debts; for that the land was not liable longer than his life-time; which caused, that the King could not safely commit any office of account to such whose lands were entailed, nor other men trust them with loan of money.

The stat. 4 H.
VII. and 32 H.
VIII. to bar
estates tail by
fine.

THESE inconveniences were all remedied by acts of parliament; as namely, by acts of parliament later than the acts of entails, made 4 H. VII. 32 H. VIII. A tenant in tail may disinherit his son by a fine with proclamation, and may by that means also make it subject to his debt and sales.

26 H. VIII.

32 H. VIII.

By a statute made 26 H. VIII. a tenant in tail doth forfeit his lands for treason; and by another act of parliament, 32 H. VIII. he may make leases good against his heir for one and twenty years, or three lives; so that it be not of his chief houses, lands, or demesne, or any lease in reversion, nor less rent reserved than the tenant have paid most part of one and twenty years before

before, nor have any manner of discharge for doing wastes and spoils : by a statute made 33 H. VIII. tenants of entailed lands are liable to the King's debts by extent, and by a statute made 13 and 39 Eliz. they are saleable for the arrearages upon his account for his office ; so that now it resteth, that entailed lands have two privileges only, which be these. First, not to be forfeited for felonies. Secondly, not to be extended for debts after the parties death, except the entails be cut off by fine and recovery.

BUT it is to be noted, that since these notable statutes, and remedies provided by statutes, do dock entails, there is start up a devise called perpetuity, which is an entail with an addition of a proviso conditional, tied to his estate, not to put away the land from his next heir ; and if he do, to forfeit his own estate. Which perpetuities, if they should stand, would bring in all the former inconveniences subject to entails, that were cut off by the former mentioned statutes, and far greater ; for by the perpetuity, if he that is in possession start away never so little, as in making a lease, or selling a little quillet, forgetting after two or three descents, as often they do, how they are tied ; the next heir must enter, who peradventure is his son, his brother, uncle, or kinsman : and this raiseth unkind suits, setting all that kindred at jars, some taking one part, some another, and the principal parties wasting their time and money in suits of law. So that in the end they are both constrained by necessity to join both in a sale of the land, or a great part of it, to pay their debts, occasioned through their suits : and if the chiefeft of the family for any good purpose of well seating himself, by selling that which lieth far off, is to buy that which is near, or for the advancement of his daughters or younger sons, should have reasonable cause to sell, this perpetuity, if it should hold good, restraineth him. And more

33 H. VIII.
13 & 39 Eliz.
entails two pri-
vileges.

1. Not forfeitable for felony.
 2. Not extendable for the debts of the party after his death : proviso, not to exclude his next heir. If he do, to forfeit his estate, and the next heir must enter.
- Of a perpetuity, which is an entail with an addition.

These perpetuities would bring in all the former inconveniences of estates tail. The inconveniences of those perpetuities.

than that, where many are owners of inheritance of land not entailed, may, during the minority of his eldest son, appoint the profits to go to the advancement of the younger sons and daughters, and pay debts; but by entails and perpetuities, the owners of these lands cannot do it, but they must suffer the whole to descend to the eldest son, and so to come to the crown by wardship all the time of his infancy.

Quære, whether it be better to restrain men by these perpetuities from alienations, or to hazard the undoing of houses by unthrifthy posterity.

WHEREFORE, seeing the dangerous times and untowardly heirs, they might prevent those mischiefs of undoing their houses, by conveying the land from such heirs, if they were not tied to the stake by those perpetuities, and restrained from forfeiting to the crown, and disposing it to their own, or to their children's good; therefore it is worthy of consideration, whether it be better for the subject and sovereign to have the lands secured to mens names and bloods by perpetuities, with all the inconveniences above-mentioned, or to be in hazard of undoing his house by unthrifthy posterity.

The last and greatest estate in land is fee-simple.

A remainder cannot be limited upon an estate in fee-simple.

The difference between a reversion and a remainder.

THE last and greatest estate of lands is fee-simple, and beyond this there is none of the former for lives, years, or entails; but beyond them is fee-simple. For it is the greatest, last and uttermost degree of estates in land; therefore he that maketh a lease for life, or a gift in tail, may appoint a remainder when he maketh another for life or in tail, or to a third in fee-simple; but after a fee-simple he can limit no other estate. And if a man do not dispose of the fee-simple by way of remainder, when he maketh the gift in tail, or for lives, then the fee-simple resteth in himself

as a reversion. The difference between a reversion and a remainder is this. The remainder is always a succeeding estate, appointed upon the gifts of a precedent estate, at the time when the precedent is appointed. But the reversion is an estate left in the giver, after a particular estate made

made

made by him for years, life, or intail; where the remainder is made with the particular estates, then it must be done by deeds in writing, with livery and seisin, and cannot be by words; and if the giver will dispose of the reversion after it remaineth in himself, he is to do it by writing, and not by word, and the tenant is to have notice of it, and to attorn it, which is to give his assent by word, or paying rent, or the like; and except the tenant will thus attorn, the party to whom the reversion is granted cannot have the reversion, neither can he compel him by any law to attorn, except the grant of the reversion be by fine; and then he may by writ provided for that purpose: and if he do not purchase that writ, yet by the fine the reversion shall pass; and the tenant shall pay no rent, except he will himself, nor be punished for any wastes in houses, woods, &c. unless it be granted by bargain and sale by indenture enrolled; these fee-simple estates lie open to all perils of forfeitures, extents, incumbrances and sales.

LANDS are conveyed by these six means; first, by feoffment, which is, where by deed lands are given to one and his heirs, and livery and seisin made according to the form and effect of the deed; if a lesser estate than fee-simple be given, and livery of seisin made, it is not called a feoffment, except the fee-simple be conveyed, but is otherwise called a lease for life or gift entail as above-mentioned.

2. A fine is a real agreement, beginning thus, *Hec est finalis concordia, &c.* This is done before the King's judges in the court of Common Pleas, concerning lands that a man should have from another to him and his heirs, or to him for his life, or to him and the heirs males of his body, or for years certain, whereupon rent may be reserved, but no condition or covenants. This fine is a record of great credit; and upon this fine are

A reversion
cannot be
granted by
word.
Atturment
must be had to
the grant of the
reversion.
The tenant not
compellable to
attorn, but
where the
reversion is
granted by
fine.

- Lands may be
conveyed,
1. By feoff-
ment.
2. By fine.
3. By recovery.
4. By use.
5. By covenant.
6. By will.

USE OF THE LAW.

four proclamations made openly in the Common Pleas ; that is, in every term one, for four terms together ; and if any man having right to the

Five years non-claim barreth not,
 1. An infant.
 2. Feme covert.
 3. Mad man.
 4. Beyond sea.

the proclamations ended, he loseth his right for ever, except he be an infant, a woman covert, a mad-man, or beyond the seas, and then his right is saved ; so that he claim within five years after

the death of her husband's full age, recovery of his wits, or return from beyond the seas. This

Fine is a feoffment of record.
 it includeth all that the feoffment doth, and worketh farther of his own nature, and barreth entails peremptorily, whether the heir doth claim within five years or not, if he claim by him that levied the fine.

What recoveries are.

**Common
voucher one of
the criers of
the court.**

**Judgment for
the defendant
against the
tenant in tail.
Judgment for
tenant to re-
cover so much
land in value of
the common
voucher.**

3. RECOVERIES are where for assurances of lands the parties do agree, that one shall begin an action real against the other, as though he had good right to the land, and the other shall not enter into defence against it, but allege that he bought the land of *J. H.* who had warranted unto him, and pray that *J. H.* may be called in to defend the title, which *J. H.* is one of the criers of the Common Pleas, and is called the common voucher. This *J. H.* shall appear and make as if he would defend it, but shall pray a day to be assigned him in his matter of defence ; which being granted him, at the day he maketh default, and thereupon the court is to give judgment against him ; which cannot be for him to lose his lands, because he hath it not, but the party that he hath sold it to, hath that who vouched him to warrant it.

THEREFORE the defendant, who hath no defence made against it, must have judgment to have the land against him that he sued (who is called the tenant) and the tenant is to have judgment against *J. H.* to recover in value so much land of his, where in truth he hath none, nor never

never will. And by this device, grounded upon the strict principles of law, the first tenant loseth the land, and hath nothing for it; but it is by his own agreement for assurance to him that bought it.

THIS recovery barreth entails, and all remainders and reversions that should take place after the entails, saving where the King is giver of the entail, and keepeth the reversion to himself; then neither the heir, nor the remainder, nor reversion, is barred by the recovery.

THE reason why the heirs, remainders, and reversions are thus barred, is because in strict law the recompence adjudged against the crier that was vouchee, is to go in succession of estate as the land should have done, and then it was not reason to allow the heir the liberty to keep the land itself, and also to have recompence; and therefore he loseth the land, and is to trust to the recompence.

THIS sleight was first invented, when entails fell out to be so inconvenience as is before declared, so that men made no conscience to cut them off, if they could finde law for it. And now by use, those recoveries are become common assurances against entails, remainders, and reversions, and are the greatest security purchasers have for their money; for a fine will bar the heir in tail, and not the remainder, nor reversion, but a common recovery will bar them all.

UPON feoffments and recoveries, the estate Upon fines, both settle as the use and intent of the parties is declared by word or writing, before the act was one: as for example, if they make a writing, that one of them shall levy a fine, make a feoffment, or suffer a common recovery to the other; but the use and intent is, that one should have it for his life, and after his decease a stranger to have it in tail, and then a third in fee-simple. In this case the land settleth in an estate according

A recoverybar-
reth an escheat
tail and all
reversions and
remainments
thereupon.

The reason
why a com-
mon recovery
barreth those
in remainder
and reversion.

The many
inconveniences
of estates in
tail brought in
these recove-
ries, which are
made now
common
conveyances
and assurances
for land.

USE OF THE LAW.

to the use and intent declared. And that by reason of the statute made 27 H. VIII. conveying the land in possession to him that hath interest in the use, or intent of the fine, feoffment, or recovery, according to the use and intent of the parties.

Bargains, sales,
and covenants
to stand seized
to a use, are all
grounded upon
one statute.

UPON this statute is likewise grounded the fourth and fifth of the six conveyances *viz.* bargains, sales, covenants to stand seized to uses; for this statute, wheresoever it findeth an use, conjoineth the possession to it, and turneth it into like quality of estate, condition, rent, and the like, as the use hath.

What a use is.

4. THE use is but the equity and honesty to hold the land *in conscientia boni viri*. As for example; I and you agree that I shall give you money for your land, and you shall make me assurance of it. I pay you the money, but you made me no assurance of it. Here although the estate of the land be still in you, yet the equity and honesty to have it is with me; and this equity is called the use, upon which I had no remedy but in chancery, until this statute was made of 27 H. VIII. and now this statute conjoineth and containeth the land to him that hath the use. I, for my money paid to you, have the land itself, without any other conveyance from you; and it is called a bargain and sale.

The stat. of 27
H. 8. doth not
pass land upon
the payment of
money without
a deed indented
and enrolled.

BUT the parliament that made that statute did foresee, that it would be mischievous that mens lands should so suddenly upon the payment of a little money be conveyed from them, peradventure in an alehouse or a tavern upon strivable advantages, did therefore gravely provide another act in the same parliament, that the land upon payment of this money should not pass away, except there were a writing indented, made between the said two parties, and the said writing also within six months inrolled in some of the courts at Westminster, or in the sessions rolls in the shire

The stat. of 27
H. 8. extendeth
not to places
where they did
enroll deeds.

where

where the land lieth; unless it be in cities or corporate towns where they did use to enroll deeds, and there the statute extendeth not.

5. THE fifth conveyance of a fine is a conveyance to stand seized to uses: it is in this sort; a man that hath a wife and children, brethren, and kinsfolks, may by writing under his hand and seal agree, that for their or any of their preferment, he will stand seized of his lands to their uses, either for life in tail or fee, so as he shall see cause; upon which agreement in writing, there ariseth an equity or honesty, that the land should go according to those agreements; nature and reason allowing these provisions; which equity and honesty is the use. And the use being created in this sort, the statute of 27 H. VIII. before mentioned, conveyeth the estate of the land, as the use is appointed.

AND so this covenant to stand seized to uses, is at this day, since the said statute, a conveyance of land, and with this difference from a bargain and sale; in that this needeth no enrollment as a bargain and sale doth, nor needeth it to be in writing indented, as bargain and sale must: and if the party, to whose use he agreeth to stand seized of the land, be not wife, or child, cousin, or one that he meaneth to marry, then will no use rise, and so no conveyance; for although the law alloweth such weighty considerations of marriage and blood to raise uses, yet doth it not admit so trifling considerations, as of acquaintance, schooling, services, or the like.

BUT where a man maketh an estate of his land to others by fine, feoffment, or recovery, he may then appoint the use to whom he listeth, without respect of marriage, kindred, or other things; for in that case his own will and declaration guideth the equity of the estate. It is not so when he maketh no estate, but agreeth to stand seized, nor when he hath taken any thing, as in the

Upon an agreement in writing to stand seized to the use of any of his kindred, a use may be created, &c.

Upon a fine, feoffment, or recovery, a man may limit the use to whom he listeth, without consideration of blood, or money. Otherwise, in a bargain and sale, cases or covenant.

cases of bargain and sale and covenant to stand to uses.

Of the continuance of land by will.

6. THE last of the six conveyances is a will in writing, which course of conveyance was first ordained by a statute made 32 H. VIII. before which statute no man might give land by will, except it were in a borough town, where there was an especial custom that men might give their lands by will; as in *London*, and many other places.

The not disposing of lands by will, was thought to be a defect at common law, that men in wars,

or suddenly falling sick, had not power to dispose of their lands, except they could make a feoffment, or levy a fine, or suffer a recovery; which lack of time would not permit: and for men to do it by these means, when they could not undo it again, was hard; besides, even to the last hour of death, mens minds might alter upon further proofs of their children or kindred, or encrease of children or debt, or defect of servants or friends to be altered.

The court that was invented before the stat. of 32 H. 8. first gave power to devise lands by will, which was a conveyance of lands to feoffees in trust, to such persons as they should declare in their will.

For which cause, it was reason that the law should permit him to reserve to the last instant the disposing of his lands, and to give him means to dispose it, which seeing it did not fitly serve, men used this devise.

THEY conveyed their full estates of their lands in their good health, to friends in trust, properly called feoffees in trust; and then they would by their wills declare how their friends should dispose of their lands; and if those friends would not perform it, the court of chancery was to compel them by reason of trust; and this trust was called the use of the land, so as the feoffees had the land, and the party himself had the use; which use was in equity, to take the profits for himself, and that the feoffees should make such an estate as he should appoint them; and if he appointed none, then the use shall go to the heir, as the estate

estate itself of the land should have done ; for the use was to the estate like a shadow following the body.

By this course of putting lands into use there were many inconveniences, (as this use which grew first for a reasonable cause,) *viz.* to give men power and liberty to dispose of their own, was turned to deceive many of their just and reasonable rights ; as namely, a man that had cause to sue for his land, knew not against whom to bring his action, nor who was owner of it. The wife was defrauded of her thirds ; the husband of being tenant by curtesy ; the lord of his wardship, relief, heriot, and escheat ; the creditor of his extent for debt ; the poor tenant of his lease ; for these rights and duties were given by law from him that was owner of the land, and none other ; which was now the feoffee of trust, and so the old owner, which we call the feoffor, should take the profits, and leave the power to dispose of the land at his discretion to the feoffee ; and yet he was not such a tenant as to be seized of the land, so as his wife could have dower, or the lands be extended for his debts, or that he could forfeit it for felony or treason, or that his heir could be ward for it, or any duty of tenure fall to the lord by his death, or that he could make any leases of it.

WHICH frauds, by degrees of time as they increased, were remedied by divers statutes ; as namely, by a statute of 1 H. VI. and 4 H. VIII. it was appointed that the action may be tried against him which taketh the profits, which was then *ceftuy que use* ; by a statute made 1 R. III. Leases and estates made by *ceftuy que use* are made good, and estates by him acknowledged. 4 H. VII. the heir of *ceftuy que use* is to be in ward ; 16 H. VIII. the lord is to have relief upon the death of any *ceftuy que use*.

The frauds of conveyances to use by degrees of time, as they increased, were remedied by the statutes.

27 H. 8. taking away all uses, in the end 27 H. VIII. the parliament purposing law to the ancient form of conveyances of land, by feoffment, fine, and recovery.

WHICH frauds nevertheless multiplying daily, to take away all those uses, and reducing the law to the ancient form of conveying of lands by publick livery of seisin, fine, and recovery, did ordain, that where lands were put in trust or use, there the possession and estate should be presently carried out of the friends in trust, and settled and invested on him that had the uses, for such term and time as he had the use.

In what manner the stat. of 32 H. 8. giveth power to dispose of lands by will.

If a man be seized of capite lands and socage, he cannot devise but two parts of the whole. The third part must descend to the heir to answer guardianship, livery and seisin to the crown.

AND so if he hold lands by knight-service of a subject, he can devise of the land but two parts, and the third the lord by wardship, and the heir by descent is to hold.

A conveyance by devise of capite lands to the wife for her jointure, &c. void for a third part, by 32 H. VIII.

AND if a man that hath three acres of land holden in *capite* by knight-service do make a jointure to his wife of one, and convey another to any of his children, or to friends, to take the profits, and to pay his debts or legacies, or daughters portions, then the third acre or any part thereof he cannot give by will, but must suffer it to descend.

descend to the heir, and that must satisfy wardship.

YET a man having three acres as before, may convey all to his wife or children by conveyance in his life-time, as by feoffment, fine, recovery, bargain and sale, or covenant to stand seized to uses, and to disinherit the heir. But if the heir be within age when his father dieth, the King, or other lord shall have that heir in ward, and shall have one of the three acres during the wardship, and to sue livery and seisin. But at full age the heir shall have no part of it, but it shall go according to the conveyance made by the father.

It hath been debated how the thirds shall be set forth. For it is the use, that all lands which the father leaveth to descend to the heir, being fee-simple, or in tail, must be part of the thirds; and if it be a full third, then the king, nor heir, nor lord, can intermeddle with the rest; if it be not a full third, yet they must take it so much as it is, and have a supply out of the rest.

THIS supply is to be taken thus; if it be the King's ward, then by a commission out of the court of wards, whereupon a jury by oath must set forth so much as shall make up the thirds, except the officers of the court of wards can otherwise agree with the parties. If there be no wardship due to the King, then the other lord is to have this supply by a commission out of the chancery, and jury thereupon.

BUT in all these cases, the statutes do give power to him that maketh the will, to set forth and appoint of himself which lands shall go for thirds, and neither King nor lord can refuse it. And if it be not enough, yet they must take that in part, and only have a supply in manner as before is mentioned out of the rest.

But a conveyance by act executed in the life-time of the party of such lands to such uses is not void, but a third part: but if the heir be within age, he shall have one of the acres to be in ward.

Entailed lands part of the thirds. The King nor lord cannot intermeddle if a full third part be left to descend to the heir.

The manner of making supply, when the part of the heir is not a full third.

The statutes give power to the testator to set out the third himself, &c.

Property in goods.

Of the several ways
whereby a man may
get property in goods
or chattels.

1. By gift.
2. By sale.
3. By stealing.
4. By waving.
5. By straying.
6. By shipwreck.
7. By forfeiture.
8. By executorship.
9. By administration.
10. By legacy.

1. Property by gift.

A deed of gift
of goods to
deceive his
creditors, is
void against
them, but good
against the
executors,
administrators,
or vendee of
the party him-
self.

BY gift, the property of goods may be passed by word or writing; but if there be a general deed of gift made of all his goods, this is suspicious to be done upon fraud, to deceive the creditors.

AND if a man who is in debt make a deed of gift of all his goods to protract the taking of them in execution for his debt, this deed of gift is void, as against those to whom he stood indebted; but as against himself, his own executors or administrators, or any man to whom afterwards he shall sell or convey them, it is good.

2. By sale.

What is a sale
bona fide, and
what not, when
there is a pri-
vate reservati-
on of trust
between the
parties.

Property in goods by sale. By sale, any man may convey his own goods to another; and although he may fear execution for debts, yet he may sell them out-right for money at any time before the execution served; so that there be no reservation of trust between them, paying the money, he shall have the goods again; for that

trust

trust in such case doth prove plainly a fraud,
to prevent the creditors from taking the goods in
execution.

3. *By theft or taking in jest.*

Property of goods by theft, or taking in jest. How a sale in market shall be a bar to the owner.

If any man steal my goods or chattels, or take them from me in jest, or borrow them of me, or as a trespasser or felon carry them to the market or fair, and sell them, this sale doth bar me of the property of my goods, saving, that if he be a horse he must be ridden two hours in the market or fair, between ten and five a clock, and tolled in the toll-book, and the seller must bring one to avouch his sale, known to the toll-book-keeper, else the sale bindeth me not. And for any other goods, where the sale in a market or fair shall be the owner, being not the seller of his property, it must be sale in a market or fair, where usually things of that nature are sold. As for example; if a man steal a horse and sell him in Smithfield, the true owner is barred by this sale; but if he sell the horse in Cheapside, Newgate, or Westminster market, the true owner is not barred by this sale; because these markets are usually for fish, fish, &c. and not for horses.

Of markets;
and what markets such a sale ought to be made in.

So whereas by the custom of London in every shop there is a market all the days of the week, saving Sundays and Holidays; yet if a piece of plate or jewel that is lost, or chain of gold or pearl that is stolen or borrowed, be sold in a draper's or scrivener's shop, or any others but a goldsmith, this sale barreth not the true owner, & in similibus.

YET by stealing alone of goods, the thief get-
not such property, but that the owner may
have them again wheresoever he findeth them;
except they were sold in fair or market, after
they

The owner
may seize his
goods after
they are stolen.

USE OF THE LAW.

they were stolen; and that *bona fide* without cause or fraud.

If the thief be condemned for felony, or outlawed, or forfeit the stoln goods to the crown, the owner is without remedy.

When the owner may take his goods from the thief.

If he convict the thief of the same felony, he shall have his goods again by a writ of restitution.

BUT if the thief be condemned of the felony, or out-lawed for the same, or out-lawed in any personal action, or have committed a forfeiture of goods to the crown, then the true owner is without remedy.

NEVERTHELESS, if fresh after the goods were stolen, the true owner maketh pursuit after the thief and goods, and taketh the goods with the thief, he may take them again: and if he make no fresh pursuit, yet if he prosecute the felon so far as justice requireth, that is, to have him arraigned, indicted, and found guilty (though he be not hanged, nor have judgment of death) or have him out-lawed upon the indictment; in all these cases he shall have his goods again, by a writ of restitution to the party in whose hands they are.

4. *By waving of goods.*

BY waving of goods, a property is gotten thus. A thief having stoln goods being pursued flyeth away and leaveth the goods. This leaving is called waving, and the property is in the King except the lord of the manor have right to it, by custom or charter.

BUT if the felon be indicted, adjudged, found guilty, or out-lawed, at the suit of the owner of these goods, he shall have restitution of these goods, as before.

5. *By straying.*

BY straying, property in live cattel is gotten. When they come into other men's justic grounds straying from the owners, then the parson or lord, into whose grounds or manors they come cause

causeth them to be seized, and a wythe put about their necks, and to be cried in three markets adjoining, shewing the marks of the cattel; which done, if the true owner claimeth them not within a year and a day, then the property of them is in the lord of the manor whereunto they did stray, if he have all strays by custom or charter, to the King.

6. Wreck, and when it shall be said to be.

BY shipwreck, property of goods is thus gotten. When a ship loaden is cast away upon the coasts, so that no living creature that was in it when it began to sink escaped to land with life, in all then all those goods are said to be wrecked, and by they belong to the crown if they be found; except the lord of the soil adjoining can entitle himself unto them by custom, or by the King's charter.

7. Forfeitures.

BY forfeitures, goods and chattels are thus gotten. If the owner be out-lawed, if he be indicted of felony, or treason, or either confess or be found guilty of it, or refuse to be tried by peers or jury, or be attainted by judgment, fly for felony; although he be not guilty, or offer the exigeant to go forth against him; although he be not out-lawed, or that he go over the seas without licence, all the goods he had the judgment, he forfeiteth to the crown; except some lord by charter can claim them. For those cases prescripts will not serve, except it be so ancient, that it hath had allowance before justices in eyre in their circuits, or in the king's Bench in ancient time.

8. By

8. *By executorship.*

BY executorship goods are gotten. When a man possessed of goods maketh his last will and testament in writing or by word, and maketh one or more executors thereof, these Executors have by the will and death of the parties, all the property of their goods, chattels, leases for years, wardships and extents, and all right concerning those things.

Executors may before probat dispose of the goods, but not bring an action for any debt.

What probat of the will is, and in what manner it is made.

THOSE executors may meddle with the goods, and dispose them before they prove the will, but they cannot bring an action for any debt or duty before they have proved the will.

THE proving of the will is thus. They are to exhibit the will into the Bishop's court, and there they are to bring the witnesses, and there they are to be sworn, and the Bishop's officers are to keep the will original, and certify the copy thereof in parchment under the Bishop's seal of office; which parchment so sealed is called the will proved.

9. *By letters of administration.*

Pū usus.

BY letters of administration property in goods is thus gotten. When a man possessed of goods dieth without any will, there such goods as the executors should have had, if he had made a will, were by ancient law to come to the Bishop of the diocese, to dispose for the good of his soul that died, he first paying his funerals and debts, and giving the rest *ad pios usus*.

THIS is now altered by statute laws, so as the Bishops are to grant letters of administration of the goods at this day to the wife if she require it, or children, or next of kin; if they refuse it, as often they do, because the debts are greater than the estate will bear, then some creditor or some other will take it as the Bishop's officers shall judge.

think meet. It groweth often in question what Bishop shall have the right of proving wills, and granting administration of goods.

In which controversy the rule is thus; that if the party dead had at the time of his death *bona notabilia* in diverse dioceses of some reasonable value, then the Archbishop of the province where he died is to have the probat of his will, and to grant the administration of his goods as the case falleth out; otherwise the Bishop of the diocese where he died is to do it.

If there be but one executor made, yet he may refuse the executorship coming before the Bishop, so that he hath not intermeddled with any of the goods before, or with receiving debts, or paying legacies.

AND if there be more executors than one, so many as list may refuse; and if any one take it upon him, the rest that did once refuse may when they will take it upon them; and no executor shall be further charged with debts or legacies, than the value of the goods come to his hands; so that he foresee that he pay debts upon record, first debts to the King, then upon judgments, statutes, recognizances, then debts by bond and bill sealed, rent unpaid, servants wages, payment to head workmen, and lastly, shop-books, and contracts by word. For if an executor, or administrator pay debts to others before to the King, or debts due by bond before those due by record, or debts by shop-books and contracts before those by bond, arrearages of rent, and servants or workmens wages, he shall pay the same over again to those others in the said degrees.

BUT yet the law giveth them choice, that where diverse have debts due in equal degree of record or specialty, he may pay which of them he will, before any suit brought against him; but if suit be brought he must first pay them that get judgment against him.

L

ANY

Where the intestate had bona notabilia in diverse dioceses, then the Archbishop of that province where he died is to commit the administration.

Executor may refuse before the Bishop, if he have not intermeddled with the goods.

Executor ought to pay,

1. Judgments.
2. Stat. recogn.
3. Debts by bonds and bills sealed.
4. Rent unpaid.
5. Servants wages.
6. Head-workmen.
7. Shop-book and contracts by word.

Any one executor may do as much as all together; but if a debt be released and assets wanting, he shall only be charged.

Otherwise of administrators.

Executor dieth making his executor, the second executor shall be executor to the first testator. But otherwise, if the administrator die making his executor, or if administration be committed of his goods. In both cases the ordinary shall commit administration of the goods of the first intestate.

Executors or administrators may retain.

ANY one executor may convey the goods, or release debts without his companion, and any one by himself may do as much as all together; but one man's releasing of debts or selling of goods, shall not charge the other to pay so much of the goods, if there be not enough to pay debts; but it shall charge the party himself that did so release or convey.

But it is not so with administrators, for they have but one authority given them by the Bishop over the goods, which authority being given to many is to be executed by all of them joined together.

AND if an executor die making an executor, the second executor is executor to the first testator.

BUT if an administrator die intestate, then his administrator shall not be executor or administrator to the first; but in that case the Bishop, whom we call the ordinary, is to commit the administration of the first testator's goods to his wife, or next of kin, as if he had died intestate; always provided, that that which the executor did in his life-time, is to be allowed for good. And so if an administrator die and make his executor, the executor of the administrator shall not be executor to the first intestate; but the ordinary must new commit the administration of the goods of the first intestate again.

If the executor or administrator pay debts, or funerals, or legacies of his own money, he may retain so much of the goods in kind, of the testator or intestate, and shall have property of it in kind.

10. Property by legacy.

Property by legacy, is where a man maketh a will and executors, and giveth legacies, he or they to whom the legacies are given must have

the assent of the executors or one of them to have his legacy, and the property of that legacy or other goods bequeathed unto him, is said to be in him; but he may not enter nor take his legacy without the assent of the executors or one of them, because the executors are charged to pay debts before legacies; and if one of them assent to pay legacies, he shall pay the value thereof of his own purse, if there be not otherwise sufficient to pay debts.

Executors or administrators may retain; because the executors are charged to pay some debts before legacies.

BUT this is to be understood by debts of record to the king, or by bill and bond sealed, or arrearages of rent, or servants or workmens wages; and not debts of shop-books, or bills unsealed, or contract by word; for before them legacies are to be paid.

Legacies are to be paid before debts by shop-books, bills unsealed, or contracts by word.

AND if the executors doubt that they shall not have enough to pay every legacy, they may pay which they list first; but they may not sell any special legacy which they will to pay debts, or a lease of goods to pay a money legacy. But they may sell any legacy which they will to pay debts, if they have not enough besides.

Executor may pay which legacy he will first.
If the executors do want they may sell any legacy to pay debts.

IF a man make a will and make no executors, or if the executors refuse, the ordinary is to commit administration *cum testamento annexo*, and take bonds of the administrators to perform the will, and he is to do it in such sort, as the executor should have done, if he had been named.

When a will is made and no executor named, administration is to be committed *cum testamento annexo*.

Ex Autogr. W. Sancroft Archiep. Cantuar.

June 3. 1629. Sam. Maunsell utter-barrister of the Middle-Temple having perus'd this book, attest-ed it to be very useful to all young students of the law, and worthy to be imprinted: and then

Lambethæ Junii 4° 1629. *Ut in aliena arte alieno nixus judicio libelli hujus imprimendi potesta-tem facio.*

JOHANNES JEFFERAY.

CASES OF TREASON.

WRITTEN BY

Sir *FRANCIS BACON*, Knight,

His MAJESTY's Solicitor-General.

C H A P. I.

WHERE a man doth compass or imagine the death of the King, the King's wife, the King's eldest son, and heir apparent, if it appear by any overt-act, it is treason.

WHERE a man doth violate the King's wife, the King's eldest daughter unmarried, the wife of the King's eldest son, and heir apparent, it is treason.

WHERE a man doth levy war against the King in the realm, it is treason.

WHERE a man is adherent to the King's enemies, giving them aid and comfort, it is treason.

WHERE a man counterfeitteth the King's great seal, privy signet, sign manual, it is treason: likewise his money.

WHERE a man bringeth into this realm false money, counterfeited to the likeness of *English*, with intent to merchandize or make payment thereof,

thereof, and knowing it to be false money, it is treason.

WHERE a man counterfeiteth any coin current in payment within this realm, it is treason.

WHERE a man doth bring in any money being current within the realm, the same being false and counterfeit, with intent to utter it, and knowing the same to be false, it is treason.

WHERE a man doth clip, waste, round, or file any of the King's money, or any foreign coin, current by proclamation, for gain's sake, it is treason.

WHERE a man doth any way impair, diminish, falsify, scale, or lighten money current by proclamation, it is treason.

WHERE a man killeth the chancellor, the treasurer, the King's justices in eyre, the King's justices of assizes, the justices of *oyer* and *terminer*, being in their several places, and doing their offices, it is treason.

WHERE a man procureth or consenteth to treason, it is treason.

WHERE a man doth persuade or withdraw any of the King's subjects from his obedience, or from the religion by his Majesty established, with intent to withdraw any from the King's obedience, it is treason.

WHERE a man is absolved, reconciled, or withdrawn from his obedience to the King, or promiseth obedience to any foreign power, it is treason.

WHERE any jesuit, or any other priest ordained since the first year of the reign of Queen Elizabeth, shall come into, or remain in any part of this realm, it is treason.

WHERE any person being brought up in a college of jesuits, or seminaries, shall not return within six months after proclamation made, and within two days after his return submit himself to take the oath of supremacy, if otherwise he do return,

and not within six months after proclamation made, it is treason.

WHERE a man committed for treason, doth voluntarily break prison, it is treason.

WHERE a jaylor doth voluntarily permit a man committed for treason to escape, it is treason.

WHERE a man relieveth or comforteth a traitor, and knoweth of the offence, it is treason.

WHERE a man doth affirm or maintain any authority of jurisdiction spiritual, or doth put in ure or execute any thing for the advancement or setting forth thereof, the third time, it is treason.

WHERE a man refuseth to take the oath of supremacy, being tendered by the Bishop of the diocese, if he be any ecclesiastical person; or by commission out of the chancery, if he be a temporal person; such offence the second time is treason.

C H A P. II.

The punishment, trial, and proceedings in cases of treason.

IN treason the corporal punishment is by drawing on a hurdle from the place of the prison to the place of execution, by hanging and being cut down alive, bowelling and quartering, and in women, burning.

IN treason there ensueth a corruption of blood in the line ascending and descending.

IN treason, lands and goods are forfeited, and inheritances, as well intailed as fee-simple, and the profits of estates for life.

IN treason, the escheats go to the King, and not to the lord of the fee.

IN treason, the land forfeited shall be in the King's actual possession without office.

IN treason there be no accessaries, but all are principals.

IN treason, no sanctuary, nor benefit of clergy, or peremptory challenge is allowed.

IN treason, if the party stand mute, yet nevertheless judgment and attainer shall proceed all one as upon verdict.

IN treason no counsel is to be allowed, nor bail permitted to the party.

IN treason no witnesses shall be received upon oath for the parties justification.

IN treason, if the fact be committed beyond the seas, yet it may be tried in any county where the King will award his commission.

IN treason, if the party be *non sancæ memoriae*, yet if he had formerly confessed it before the King's counsel, and that it be certified that he was of good memory at the time of his examination and confession, the court may proceed to judgment without calling or arraigning the party.

IN treason, the death of the party before conviction dischargeth all proceedings and forfeitures.

IN treason, if the party be once acquitted, he should not be brought in question again for the same fact.

IN treason, no new case not expressed in the statute of 25 E. 3. or made treason by any special statute since, ought to be judged treason, without consulting with the parliament.

IN treason, there can be no prosecution but at the King's suit, and the King's pardon dischargeth.

IN treason, the King cannot grant over to any subject power and authority to pardon it.

IN treason, a trial of a peer of the kingdom is to be by special commission before the lord high steward, and those that pass upon him to be none but peers : the proceeding is with great solemnity, the lord-steward sitting under a cloth

of estate with a white rod of justice in his hand; and the peers may confer together, but are not any ways shut up; and are demanded by the lord-steward their voices one by one, and the plurality of voices carries it.

IN treason, it hath been an ancient use and favour from the Kings of this realm to pardon the execution of hanging, drawing, and quartering; and to make warrant for their beheading.

THE proceeding in case of treason with a common subject is in the King's Bench, or by commission of *oyer and terminer*.

C H A P. III.

Cases of misprision of treason.

WHERE a man concealeth high treason only, without any conforting or abetting, it is misprision of treason.

WHERE a man counterfeitteth any foreign coin of gold or silver not current in the realm, it is misprision of treason.

WHERE a man fixes an old seal to a new patent, it is misprision of treason.

C H A P. IV.

The punishment, trial, and proceedings in cases of misprision of treason.

THE punishment of misprision of treason is by perpetual imprisonment, loss of the issues and profits of their lands during life, and loss of goods and chattels.

THE proceeding and trial is as in cases of high treason.

IN misprision of treason bail is not admitted.

C H A P.

C H A P. V.

Cases of petty treason.

WHERE a servant killeth his master, the wife the husband, the spiritual man his prelate, to whom he is subordinate, and oweth faith and obedience, it is petty treason.

WHERE a son killeth the father or mother, it hath been questioned whether it be petty treason, and the late experience and opinion seemeth to sway to the contrary, though against law and reason in my judgment.

WHERE a servant killeth his or her master or mistress after they are out of service, it is petty treason.

C H A P. VI.

The punishment, trial, and proceeding in cases of petty treason.

IN petty treason, the corporal punishment is by drawing on an hurdle, and hanging, and in a woman burning.

IN petty treason, the forfeiture is the same with the case of felony.

IN petty treason, all accessories are but in case of felony.

C H A P. VII.

Cases of felony.

WHERE a man committeth murder or homicide of malice prepensed, it is felony.

WHERE a man committeth murder (that is) breaking of an house with an intent to commit felony, it is felony.

WHERE

CASES OF FELONY.

WHERE a man committeth manslaughter, that is, homicide of sudden heat, and not of malice prepensed, it is felony.

WHERE a man rideth armed with a felonious intent, it is felony.

WHERE a man doth maliciously and feloniously burn any man's house, it is felony.

WHERE a man doth maliciously, &c. burn corn upon the ground, or in stack, it is felony.

WHERE a man doth maliciously cut out another man's tongue, or put out his Eyes, it is felony.

WHERE a man robbeth or stealeth, *viz.* taketh away another man's goods, above the value of 12*d.* out of his possession, with intent to conceal it, it is felony.

WHERE a man embezzeleth and withdraweth any of the King's records at Westminster, whereby a judgment is reversed, it is felony.

WHERE a man having the custody of the King's armour, munition, or other habiliments of war, doth maliciously convey away the same, it is felony, if it be to the value of twenty shillings.

WHERE a servant hath goods of his master's, delivered unto him, and goeth away with them, it is felony.

WHERE a man conjures, or invokes wicked spirits, it is felony.

WHERE a man doth use or practise witchcraft, whereby any person shall be killed, wafted, or lamed, it is felony.

WHERE a man practiseth any witchcraft, to discover treasure hid, or to discover stoln goods, or to provoke unlawful love, or to impair or hurt any man's cattle or goods the second time, having been once before convicted of like offence, it is felony.

WHERE a man useth the craft of multiplication of gold or silver, it is felony.

WHERE

WHERE a man receiveth a seminary priest, knowing him to be such a priest, it is felony.

WHERE a man taketh away a woman against her will, not claiming her as his ward or bond-woman, it is felony.

WHERE a man or woman marrieth again, his or her former husband or wife being alive, it is felony.

WHERE a man committeth buggery with a man or beast, it is felony.

WHERE any persons, above the number of twelve, shall assemble themselves with intent to put down inclosures, or bring down prices of victuals, &c. and do not depart after proclamation, it is felony.

WHERE a man shall use any words to encourage or draw any people together, *ut supra*, and they do assemble accordingly, and do not depart after proclamation, it is felony.

WHERE a man being the King's sworn servant, conspireth to murder any lord of the Realm, or any privy counsellor, it is felony.

WHERE a soldier hath taken any parcel of the King's wages, and departeth without licence, it is felony.

WHERE a recusant, which is a seducer, and persuader, and inciter of the King's subjects against the King's authority in ecclesiastical causes, or a persuader of conventicles, or shall refuse to abjure the realm, it is felony.

WHERE vagabonds be found in the realm, calling themselves *Egyptians*, it is felony.

WHERE a purveyor doth take without warrant, or otherwise doth offend against certain special laws, it is felony.

WHERE a man hunts in any forest, park, or warren, by night or by day, with vizard or other disguisements, and is examined thereof and concealeth his fact, it is felony.

WHERE

WHERE

CASES OF FELONY.

WHERE one stealeth certain kind of hawks, it is felony.

WHERE a man committeth forgery the second time, having been once before convicted, it is felony.

WHERE a man transporteth rams or other sheep out of the King's dominions the second time, it is felony.

WHERE a man being imprisoned for felony breaks prison, it is felony.

WHERE a man procureth or consenteth to felony to be done, it is felony, as to make him accessory before the fact.

WHERE a man receiveth or relieveth a felon, it is felony, as to make him accessory after the fact.

WHERE a woman, by the constraint of her husband, in his presence, joineth with him in committing of felony, it is not felony in her, neither as principal, nor as accessory.

Chance-medley.

Homicide, or the killing
of a man is to be con-
sidered in four kinds,

Se defendendo.

Manslaughter.

Wilful murder.

C H A P. VIII.

*The punishment, trial, and proceedings in cases of
felony.*

IN felony, the corporal punishment is hanging, and it is doubtful whether the King may turn it into beheading in the case of a peer, or other person of dignity, because in treason the striking off the head is part of the judgment, and so the King pardoneth the rest: but in felony, it is no

part

part of the judgment, and the King cannot alter the execution of law; yet precedents have been both ways; if it be upon indictment the King may, but upon an appeal he cannot.

In felony there followeth corruption of blood, except it be in cases made felony by special statutes, with a *proviso* that there shall be no corruption of blood.

In felony, lands in fee-simple, and goods and chattels are forfeited, and the profits of estates for life are likewise forfeited, but not lands intailed: and by some customs lands in fee-simple are not so forfeited;

*The father to the bough
The son to the plough.*

as in *Gavelkind*, in *Kent*, and other places.

In felony, the escheats go to the lord of the fee, and not to the King, except he be lord: but profits for the estates for lives, or in tail during the life of tenant in tail, go to the King; and the King hath likewise *annum & diem & vacum*.

In felony, lands are not in the King before office, nor in the lord before entry or recovery by a writ of escheat, or death of the party attainted.

In felony, there can be no proceeding with the accessory, before there be a proceeding with the principal; if he die, or plead his pardon, or have his clergy before attainder, the accessory can never be dealt with.

In felony, if the party stand mute, and will not put himself upon trial, or challenge peremptorily above that the law allows, he shall have judgment, not of hanging, but of penance of so the resiling to death; but there he saves his lands is no forfeiture only his goods.

CASES OF FELONY.

IN felony, at the common law, the benefit of clergy or sanctuary was allowed; but now by statute it is taken away in most cases.

IN felony, bail may be admitted where the fact is not notorious, and the person not of ill name.

IN felony, no counsel is to be allowed to the party, no more than in treason.

IN felony, if the fact be committed beyond the seas, or upon the seas, *super altum mare*, there is no trial at all in one case, nor by course of jury in the other, but by the jurisdiction of the admiralty.

IN felony no witness shall be receiv'd upon oath for the parties justification, no more than in treason.

IN felony, if the party be *non sana memorie*, although it be after the fact, he cannot be tried nor adjudged, except it be in course of out-lawry, and that is also erroneous.

IN felony the death of the party before conviction dischargeth all proceedings and forfeitures

IN felony, if the party be once acquit, or in peril of judgment of life lawfully, he shall never be brought in question again for the same fact.

IN felony, the prosecution may be either in the King's suit, or by way of appeal, the defendant shall have his course, and produce witnesses upon oath, as in civil causes.

IN felony, the King may grant hault-justice to a subject, with the regality of power to pardon it.

IN felony, the trial of peers is all one as in case of treason.

IN felony, the proceedings are in the King Bench, or before commissioners of *oyer et terminer*; or of gaol-delivery; and in some cases before justices of the peace.

C H A P. IX.

Cases of felony de se, with the punishment, trial, and proceeding.

IN the civil law, and other laws, they make a difference of cases of felony *de se*; for where a man is called in question upon any capital crime, and killeth himself to prevent the law, there they give the judgment in all points of forfeiture, as if they had been attainted in their lifetime: and on the other side, where a man killeth himself upon impatience of sickness, or the like, they do not punish it at all: but the law of England taketh it all in one degree, and punisheth only with loss of goods to be forfeited to the King, who generally grants them to his almoner, where they be not formerly granted unto special liberties.

C H A P. X.

Cases of Præmunire.

WHERE a man purchaseth or accepteth any provision, that is, collation, of any spiritual benefice or living from the see of Rome, it is *præmunire*.

WHERE a man shall purchase any process to draw any people off the King's allegiance out of the realm, in plea whereof the cognizance per-

as it rains to the King's court, and cometh not in person to answer his contempt in that behalf before the King and his council, or in his chancery, it is *præmunire*.

WHERE a man doth sue in any court which is not the King's court, to defeat or impeach any judgment given in the King's court, and doth not appear to answer his contempt, it is *præmunire*.

WHERE

WHERE a man doth purchase or pursue in the court of *Rome*, or elsewhere, any process, sentence of excommunication, bull, or instrument, or other thing which toucheth the King in his regality, or his realm in prejudice, it is *præmunire*.

WHERE a man doth affirm or maintain any foreign kind of jurisdiction spiritual, or doth put in ure or execution any thing for the advancement or setting forth thereof; such offence the second time committed is *præmunire*.

WHERE a man refuseth to take the oath of supremacy being tendered by the Bishop of the dioceſe, if it be an ecclesiastical person; or by a commission out of the chancery, if it be a temporal person, it is *præmunire*.

WHERE a dean and chapter of any church upon the *conge de Eſſire* of an Archbishop or Bishop doth refuse to elect any such Archbishop or Bishop as nominated unto them in the King's letters missive, it is *præmunire*.

WHERE a man doth contribute or give relief to any jesuit or seminary priests, or to any person brought up therein, and called home, and not returning, it is case of *præmunire*.

WHERE a man is a broker of an usurious contract above ten in the hundred, it is *præmunire*.

C H A P. XI.

The punishment, trial, and proceedings in cases of præmunire.

THE punishment is by imprisonment during life, forfeiture of goods, forfeiture of lands in fee-simple, and forfeiture of the profits of lands intailed, or for life.

THE trial and proceeding is as in cases of misprision of treason, and the trial is by peers, where a peer of the realm is the offender.

STRIKING any man in the face of the King's courts, is forfeiture of lands, perpetual imprisonment, and loss of that hand.

C H A P. XII.

Cases of abjuration and exile, and the proceedings therein.

WHERE a man committeth any felony, for the which at this day he may have privilege of sanctuary, and confesseth the felony before the coroner, he shall abjure the liberty of the realm, and choose his sanctuary; and if he commit any new offence, or leave his sanctuary, he shall lose the privilege thereof, and suffer as if he had not taken sanctuary.

WHERE a man not coming to the church, and being a popish recusant doth persuade any the King's subjects to impugn his Majesty's Authority in causes ecclesiastical, or shall persuade any subject to come to any unlawful conventicles, and shall not after conform himself within a time, and make his submission, he shall abjure the realm, and forfeit his goods and lands during life; and if he depart not within the time prefixed, or return, he shall be in the degree of a felon.

WHERE a man being a *popish* recusant, and not having lands to the value of twenty marks *per annum*, nor goods to the value of 40*l.* shall not repair to his dwelling, or place where he was born, and there confine himself within the compass of five miles, he shall abjure the realm; and if he return, he shall be in case of a felon.

WHERE a man kills the King's deer in chases or forests, and can find no sureties after a year's imprisonment, he shall abjure the realm.

WHERE a man is a trespasser in parks, or in ponds of fish, and after three years imprisonment

ment cannot find sureties, he shall abjure the realm.

WHERE a man is a ravisher of any child, whose marriage belongs to any person, and marrieth the said child after years of consent, and is not able to satisfy for the marriage, he shall abjure the realm.

C H A P. XIII.

Cases of heresy, and the trial and proceeding therein.

THE declaration of heresy, and likewise the proceedings and judgment upon hereticks, is by the common laws of this realm referred to the jurisdiction ecclesiastical; and the secular arm is reached to them by the common laws, and not by any statute for the execution of them by the King's writ *dé bæretico comburendo*.

C H A P. XIV.

The King's prerogative in parliament.

THE King hath an absolute negative voice to all bills that pass the parliament, so as without his royal assent they have a mere nullity, and not so much as *authoritas præscripta* or *senatus consulta* had, notwithstanding the intercession of tribunes.

THE King may summon parliaments, dissolve them, prorogue them, and adjourn them at his pleasure.

THE King may add voices in the parliament at his pleasure, for he may give privilege to borough towns as many as he will, and may likewise call and create barons at his pleasure.

No man can sit in parliament except he take the oath of allegiance.

C H A P.

C H A P. XV.

The King's prerogative in matters of war or peace.

THE King hath power to declare and proclaim war, and to make and conclude peace and truce at his pleasure.

THE King hath power to make leagues and confederacies with foreign states, more strait and less strait, and to revoke and disannul them at his pleasure.

THE King hath power to command the bodies of his subjects for the service of his wars, and to muster, train and levy men, and to transport them by sea or land at his pleasure.

THE King hath power in time of war to execute martial law, and to appoint all officers of war at his pleasure.

THE King hath power to grant his letter of mart and reprisal for remedy to his subjects upon foreign wrongs at his pleasure.

THE King hath power to declare laws by his letters patent for the government of any place conquered by his arms at his pleasure.

THE King may give knighthood, and thereby enable any subject to perform knight-service at his pleasure.

C H A P. XVI.

The King's prerogative in matters of monies.

THE King may alter his standard in baseness or fineness of his coin at his pleasure.

THE King may alter his stamp in form at his pleasure.

THE King may alter the valuations of his coin, and raise and fall monies at his pleasure.

OF THE KING'S PREROGATIVE.

THE King by his proclamation may make monies of his own current, or not current, at his pleasure.

THE King may take or refuse the subjects bullion, and coin more or less money.

THE King by his proclamation may make foreign money current or not current.

C H A P. XVII.

The King's prerogative in matters of trade and traffick.

THE King may constrain the person of any of his subjects not to go out of the realm at all.

THE King may restrain any of his subjects to go out of the realm into any special part foreign.

THE King may forbid the exportation of any commodities out of the realm.

THE King may forbid the importation of any commodities into the realm.

THE King may set a reasonable impost upon any foreign wares that come into the realm, and so of native wares that go out of the realm.

C H A P. XVIII.

The King's prerogative in the Persons of his subjects.

THE King may create any corporation or body politick, and enable them to purchase, and grant, and to sue, and be sued; and that with such restrictions and modifications as he pleases.

THE King may denizen and enable any foreigner for him and his descendants after the charter, though he cannot naturalize nor enable him to make pedigree from ancestors paramount.

THE

THE King may enable any attainted person (by his charter of pardon) to purchase, and to purge his blood for the time to come, though he cannot restore his blood for the time past.

THE King may enable any dead person in law, as men professed, to take and purchase to the King's benefit.

C H A P. XIX.

An answer to the questions proposed by Sir Alexander Hay, Knight, touching the office of constables.

1. TO the first; of the original of the authority of constables, it may be said, *caput inter nubila condit*; for the authority was granted upon the ancient laws and customs of this kingdom practised long before the conquest, and intended and instituted for the conservation of the peace, and repressing of all manner of disturbance and hurt of the people, and that as well by way of prevention as punishment; but yet so, as they have no judicial power, to hear and determine any cause, but only a ministerial power, as in the answer of the seventh article more at large is set down.

As for the office of the high constable, the original of that is yet more obscure; for though the high constable's authority hath the more ample circuit, he being over the hundred, and the petty constable over the village; yet I do not find that the petty constable is subordinate to the high constable, or to be ordered or commanded by him; and therefore, I doubt, the high constable was not *ab origine*; but that when the business of the country encreased, the authority of the justices of peace was enlarged by divers statutes, then, for conveniency sake, the office of high constables grew in use for the receiving of the commands and precepts from the justices of

peace, and distributing them to the petty constables ; and in token of this, the election of high constables in most parts of the kingdom is by the appointment of the justices of peace ; whereas the election of the petty constable is by the people.

BUT there be two things unto which the office of constable hath special reference and relation, and which of necessity, or at least a kind of congruity, must precede the jurisdiction of that office ; I mean, either the things themselves, or somewhat that hath a similitude or analogy towards them.

1. THE one is the division of the territory, or gross of the shires into hundreds, villages, and towns ; for he high constable is officer over the hundred, and the petty constable is over the town or village.

2. THE other is the court-leet, unto which the constable is a proper attendant and minister ; for there the constables are chosen by the jury, there they are sworn, and there that part of their office which concerneth information is principally to be performed ; for the jury is to present offences, and offenders are chiefly to take light from the constables of all matters of disturbance and nuisance of the people, which they (in respect of their office) are presumed to have best and most particular knowledge of.

C H A P. XX.

Three ends of the institution of the court-leet.

1. THE first end of the institution of the court-leet is, to take the ancient oath of allegiance of all males above the age of twelve years.

2. THE second, to enquire of all offences against the peace ; and for those that are against the crown and peace both, to enquire of only, and certify to the justices of gaol-delivery ; but those

that

that are against the peace simply, they are to enquire and punish.

3. THE third is, to enquire of, punish, and remove all publick nusances and grievances concerning infection of air, corruption of victuals, ease of chaffer, and contract of all other things that may hurt or grieve the people in general, in their health, quiet and welfare.

AND to these three ends, as matters of policy subordinate, the court-leet hath power to call upon the pledges that are to be taken for the good behaviour of the resiants that are not tenants, and to enquire of all defaults of officers, as constables, ale-tasters, and the like: and likewise for the choice of constables, as aforesaid.

1. THE jurisdiction of these leets is ever remaining in the King, and in that case exercised by the sheriff in his turn, which is the grand leet, granted over to subjects; but yet it is still the King's court.

2. To the second, as was said, the election of the petty constable is at the court-leet by the inquest that makes the presentments; the election of the head constables is by the justices of the peace at their quarter-sessions.

3. To the third, the office is annual, except they be removed.

4. To the fourth, they be men (as it is now used) of inferior, yea, of base condition, which is a mere abuse or degenerating from the first institution; for the petty constables in towns ought to be of the better sort of resiants in the said town; save that they ought not to be aged or sickly, but men of able bodies in respect of the keeping watch and toil of their place; neither ought they to be in any man's livery: and the high constables ought to be of the ablest sort of free-holders, and of the substantiallest sort of yeomen, next to the degree of gentlemen; but they ought to be such as are not incumbered with any other

OFFICE OF CONSTABLES.

office, as mayor of a town, under-sheriff, bailiff, &c.

5. To the fifth, they have no allowance, but are bound by duty to perform their offices *gratis*, which may the rather be endured, because it is but annual; and they are not tyed to keep or maintain any fervants or under-ministers, for that every one of the King's people are bound to assist them.

6. To the sixth, upon complaint made (of his refusal) to any one justice of peace, the said justice may bind him over to the sessions, where (if he cannot excuse himself by some just allegation) he may be fined and imprisoned for his contempt.

7. To the seventh, the authority of constables, as it is substantive, and of itself, or substituted, and astricited to the warrants and commands of the justices of peace; so again it is original, or additional; for either it was given them by the common law, or else annexed by divers statutes. And as for subordinate power, wherein the constable is only to execute the commandments of the justices of peace, and likewise the additional power which is given by divers statutes, it is hard to comprehend them in any brevity; for that they do correspond to the office and authority of the justices of peace, which is very large, and are created by the branches of several statutes, which are things of divers and dispersed natures: but for the original and substantive power of a constable, it may be reduced to three heads:

1. For matter of peace only.
2. For matter of peace and the crown.
3. For matter of nuisance, disturbance and disorder, although they be not accompanied with violence and breach of peace.

For pacifying of quarrels begun, the constables may, upon hot words given, or likelihood of breach of peace to ensue, command them in the

King's

King's name to keep the peace, and depart, and forbear, and so he may, where an affray is made, part the same, and keep the parties asunder, and arrest and commit the breakers of the peace, if they will not obey, and call power to assist him for the same purpose.

FOR punishment of breach of peace past, the law is very tender and sparing in giving any authority to constables, because he hath no power judicial, and the use of his office is rather for preventing or staying of mischief, than for punishing of offences ; for in that part he is rather to execute the warrants of the justices ; or when any sudden matter ariseth upon his view, or notorious circumstances, to apprehend offenders, and carry them before the justice of peace, and generally to imprison in like cases of necessity, where the case will not endure the present carrying of the party before the justices. And thus much for the matters of peace.

FOR matters of the crown, the office of the constable consisteth chiefly in these four parts :

1. THE first is arrest.
2. THE second is search.
3. THE third is hue and cry.
4. AND the fourth is seizure of goods.

ALL which the constable may perform of his own authority, without any warrant of the justices of the peace.

1. FOR first, if any man will lay murder or felony to another's charge, or do suspect him of murder or felony, he may declare it to the constable, and the constable ought upon such declaration or complaint, to carry him before a justice ; and if by common voice or fame any man be suspected, the constable of duty ought to arrest him, and bring him before a justice, though there be no other accusation or declaration.

2. If

2. If any house be suspected for the receiving or harbouring of any felon, the constable, upon complaint or common fame, may search.

3. If any fly upon the felony, the constable ought to raise hue and cry, and search his goods, and keep them safe without impairing, and to inventory them in the presence of honest neighbours.

4. For matters of common nuisance and grievance, they are of a very variable nature, according to the several comforts which man's life and society requireth, and the contraries which infest the same.

In all which, be it matter of corrupting air, water, or victuals, or stopping, straitening, or endangering passage, or general deceits in weights, measures, or sizes, or counterfeiting wares, and things vendible; the office of the constable is to give (as much as in him lies) information of them, and of the offenders in leets, that they may be presented; but because leets are kept but twice in the year, and many of these things require present or speedy remedy, the constable, in things of notorious and vulgar nature, ought to forbid and repress them in the mean time.

8. To the eighth, they are for their contempt to be fined and imprisoned by the justices in their sessions.

9. To the ninth, the oath they take is in this manner.

" You shall swear that you shall well and truly serve the King, and the lord of this law-day
 " and you shall cause that the peace of our sovereign lord the King shall be well and duly kept
 " to your power: and you shall arrest all those
 " that you see committing riots, debates, and affrays in breach of peace: and you shall witness
 " and duly endeavour yourself to your best knowledge, that the statutes of Winchester for watch
 " hue and cry, and the statutes made for the punishment

punishment of sturdy beggars, vagabonds, rogues, and other idle persons coming within your office be truly executed, and the offenders punished: and you shall endeavour, upon complaint made, to apprehend barretors and riotous persons making affrays; and likewise to apprehend felons; and if any of them make resistance with force, and multitude of misdoers, you shall make out-cry, and pursue them till they be taken; and shall look unto such persons as use unlawful games; and you shall have regard unto the maintenance of artillery; and you shall well and duly execute all process and precepts sent unto you from the justices of peace of the county; and you shall make good and faithful presentments of all blood-sheds, out-cries, affrays, and rescues made within your office: and you shall well and duly, according to your power and knowledge, do that which belongeth to your office of constable to do, for this year to come. So help, &c.

10. To the tenth, the authority is the same in substance, differing only in extent; the petty-constable serving only for one town, parish, or borough; the head-constable serving for the whole hundred: neither is the petty-constable subordinate to the head-constable for any commandment that proceeds from his own authority; but it is used, that the precepts of the justices be delivered unto the high-constables, who being few in number, may better attend the justices, and then the head-constables, by virtue thereof, make their precepts over to the petty-constables.

11. To the eleventh, in case of necessity he may appoint a deputy, or in default thereof, the steward of the court-leet may; which deputy ought to be sworn before the said steward.

Now to conclude; the office of constables consists wholly in these three things, *viz.*

THEIR

- THEIR office concerning, 1. The conservation of the peace.
2. THE serving the precepts and warrants of the justices.
3. THEIR attendance for the execution of statutes.

C H A P. XXI.

Of the jurisdiction of justices itinerantes in the principality of Wales.

King's Bench.

Common
pleas.

Justices of
assize.

In the King's
gift.

THESE justices have power to hear and determine all criminal causes, which are called in the laws of *England*, the pleas of the crown; and herein they have the same jurisdiction that the justices have in his Majesty's Bench, commonly called the King's Bench at *Westminster*.

THEY have jurisdiction, to hear and determine all civil causes, which are called in the laws of *England*, common pleas, and to take knowledge of all fines levied of lands or hereditaments, without suing out any *dedimus potestatem*; and herein they have the same jurisdiction that the justices of the common pleas do execute at *Westminster*.

Also they may hear and determine all assizes upon disseisines of lands or hereditaments, wherein they equal the jurisdiction of the justices of assize.

THEY may hear and determine all notable violences and outrages perpetrated or done within their several precincts of the principality of *Wales*. And therein they have the same jurisdiction of the justices of *oyer & terminer*.

THE prothonotary his office is to draw all pleadings, and to enter and engross all records and judgments in civil causes.

THE clerk of the crown his office is to draw and engross all proceedings, arraignments, and judgments in criminal causes.

THE marshal's office is to attend the persons of the judges at their coming, sitting, and going from the sessions or court.

These two offices are in the disposing of the judges.

THE crier is *tanquam publicus praeco*, to call forth such persons whose appearances are necessary, and to impose silence to the people.

THERE is a commission under the great seal of England to certain gentlemen, giving them power to preserve the peace, and to resist and punish all turbulent persons, whose misdemeanors may tend to the disquiet of the people; and these be called the justices of peace, and every of them may well and truly be called and termed *Eirearcha*.

THE chief of them is called *custos rotulorum*, in whose custody all the records of their proceedings are residing.

OTHERS there are of that number called justices of peace, and *quorum*, because in their commission they have power to sit and determine causes concerning breach of peace, and misbehaviour; the words of their commission are conceived thus, *quorum* such and such, *unum vel duos esse volumus*; and without some one or more of them of the *quorum*, no sessions can be held: and for the avoiding of a superfluous number of such justices (for through the ambition of many, it is counted a credit to be burthened with that authority) the statute of 38 H. VIII. expressly prohibited that there shall be but eight justices of peace in every county. These justices do hold their sessions quarterly.

These justices appointed by the lord-keeper.

IN every shire where the commission of the peace is established, there is also a clerk of the peace for the entering and engrossing of all proceedings before the said justices. And this officer appointed by the *custos rotulorum*.

OFFICE OF CONSTABLES.

EVERY shire hath its sheriff, which word being of the *Saxon English*, is as much to say as shire reeve, or minister or bailiff of the county: his function or office is two-fold:

1. Ministerial.
2. Judicial.

As touching his ministerial office, he is the minister and executioner of all the process and precepts of the courts of law, and thereof ought to make return and certificate.

^{34 H. 8. cap. 16.} As touching his judicial office, he hath authority to hold two several courts of distinct natures: the one called the *tourne*, because he keepeth his turn and circuit about the shire, and holdeth the same court in several places, wherein he doth enquire of all offences perpetrated against the common law, and not forbidden by any statute or act of parliament; and the jurisdiction of this court is derived from justice distributive, and is for criminal offences, and is held twice every year.

THE other is called the county court, wherein he doth determine all petty and small causes civil under the value of forty shillings, arising within the said county, and thereof it is called the county court.

THE jurisdiction of this court is derived from justice commutative, and is held every month: the office of the sheriff is annual, and in the King's gift, whereof he is to have a patent.

^{44 H. 8. 20.} EVERY shire hath an officer called an escheator, which is an office to attend the King's revenue, and to seize into his Majesty's hands all lands either escheated goods, or lands forfeited, and therefore is called escheator; and he is to enquire by good inquest of the death of the King's tenants, and to whom their lands are descended, and to seize their bodies and lands for ward, if they be within age, and is accountable for the same.

OFFICE OF CONSTABLES:

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same ; and this officer is named by the lord treasurer of *England*.

THERE are in every shire two other officers called crowners or coroners : they are to enquire by good inquest in what manner, and by whom every person dying of a violent death, came so to his Death ; and to enter the same of record ; which is matter criminal, and a plea of the crown ; and therefore they are called coroners, or crowners, as one hath written, because their enquiry ought to be publick *in corona populi*.

THESE officers are chosen by the freeholders of the shire, by virtue of a writ out of the chancery, *de coronatore eligendo* : and of them I need not to speak more, because these officers are in use elsewhere.

In Scotland likewise.

FORASMUCH as every shire is divided into hundreds, it is also by the said statute of 34 H. VIII. cap. 26. ordered that two sufficient gentlemen or yeomen shall be appointed constables of every hundred.

ALSO there is in every shire one gaol or prison appointed for the restraint of liberty of such persons as for their offences are thereunto committed, until they shall be delivered thence by course of law.

IN every hundred of every shire the sheriff thereof shall nominate sufficient persons to be bailiffs of that hundred, and underministers of the sheriff ; and they are to attend upon the justices in every of their courts and sessions.

N. B. *Archbishop Sancroft notes on this last chapter*: written (say some) by Sir John Dodderidge one of the justices of the King's Bench, 1608.

THE

(192)

THE
ARGUMENTS
IN
LAW
OF

Sir *FRANCIS BACON*, Knight,

The King's Solicitor-General,

In certain great and difficult CASES:

Now first printed from the author's original and undoubted copy,
corrected by his own hand.

To my loving friends and fellows,

The READERS, ANCIENTS, UTTER-
BARRISTERS and STUDENTS
of *Grays-Inn*.

I Do not hold the law of *England* in so mean
an account, but that which other laws are
held worthy of, should be due likewise to
our laws, as no less worthy of our state. There-
fore when I found that not only in the ancient
times,

times, but now at this Day in *France*, *Italy*, and other nations, the speeches, and as they term them pleadings, which have been made in judicial cases (where the cases were mighty and famous) have been set down by those that made them, and published; so that not only a *Cicero*, a *Demosthenes* or an *Aescines* hath set forth his Orations, as well in the judicial as deliberative, but a *Marian* and a *Pavier* have done the like by their pleadings; I know no reason why the same should not be brought in use by the professors of our law for their arguments in principal cases. And this I think the more necessary, because the compendious form of reporting resolutions with the substance of the reasons, lately used by Sir *Edward Cooke*, lord chief justice of the Kings Bench, doth not delineate or trace out to the young practisers of law, a method and form of argument for them to imitate. It is true I could have wished some abler person had begun; but it is a kind of order sometimes to begin with the meanest. Nevertheless thus much I may say with modesty, that these arguments which I have set forth (most of them) are upon subjects not vulgar; and therewithal, in regard of the commixture, which the course of my life hath made of law with other studies, they may have the more variety, and perhaps the more depth of reason: for the reasons of municipal laws, severed from the grounds of nature, manners and policy, are like wall flowers, which though they grow high upon the crests of states, yet they have no deep root: Besides in all publick services I ever valued my reputation more than my pains; and therefore in weighty causes I always used extraordinary diligence; in all which respects I persuade myself the reading of them will be not unprofitable. This work I knew not to whom to dedicate, rather than to the Society of GRAYS-INN, the place whence my father was called to the highest place of justice,

DEDICATION.

and where myself have lived and had my procedure, so far, as by his Majesty's rare, if not singular grace, to be of both his counsels: and therefore few men so bound to their societies by obligation, both ancestral and personal, as I am to yours: which I would gladly acknowledge not only in having your name joined with mine own in a book, but in any other good office and effect which the active part of my life and place may enable me unto toward the society, or any of you in particular. And so I bid you right heartily farewell.

Your assured loving friend and fellow,

FRANCIS BACON.

THE

T H E

C A S E

O F

IMPEACHMENT of WASTE,

Argued before all the JUDGES in the
EXCHEQUER-CHAMBER.

THE case needs neither repeating nor opening. The point is in substance but one, familiar to be put, but difficult to be resolved; that is, whether upon a lease without impeachment of waste, the property of the timber-trees after severance, be not in him that is owner of the inheritance.

THE case is of great weight, and the question of great difficulty: weighty it must needs be, for that it doth concern or may concern all the lands in *England*; and difficult it must be, because this question sails in *confuentiis aquarum*, in the meeting or strife of two great tides. For there is a strong current of practice and opinion on the one side, and there is a more strong current (as I conceive) of authorities, both ancient and late on the other side. And therefore according to the reverend custom of the realm, it is brought now to this assembly; and it is high time the question

CASE OF IMPEACHMENT OF WASTE.

receive an end, the law a rule, and mens conveyances a direction.

THIS doubt ariseth and resteth upon two things to be considered; first, to consider of the interest and property of a timber-tree, to whom it belongeth: and secondly, to consider of the construction and operation of these words or clause, *absque impetitione vasti*: for within these two branches will aptly fall whatsoever can be pertinently spoken in this question, without obscuring the question by any other curious division.

FOR the first of these considerations, which is the interest or property of a timber-tree, I will maintain and prove to your lordships three things.

FIRST, that a timber-tree while it groweth, is merely parcel of the inheritance, as well as the soil itself. And secondly, I will prove, that when either nature, or accident, or the hand of man hath made it transitory, and cut it off from the earth, it can't change the owner, but the property of it goes where the inheritance was before. And thus much by the rules of the common law.

AND thirdly, I will shew that the statute of Gloucester doth rather corroborate and confirm the property in the lessor, than alter it, or transfer it to the lessee.

AND for the second consideration, which is the force of that clause, *absque impetitione vasti*, I will also uphold and make good three other assertions.

FIRST, that if that clause should be taken in the sense which the other side would force upon it, that it were a clause repugnant to the state and void.

SECONDLY, that the sense we conceive and give is natural in respect of the words, and for the matter agreeable to reason and the rules of law.

AND lastly, that if the interpretation seem ambiguous and doubtful, yet the very mischief itself,

self, and consideration of the common-wealth, ought rather to incline your lordships judgment to our construction.

My first assertion therefore is, that a timber-tree is a solid parcel of the inheritance, which may seem a point admitted, and not worth the labouring. But there is such a chain in this case, as that which seemeth most plain, if it's sharply looked into, doth invincibly draw on that which is most doubtful. For if the tree be parcel of the inheritance unsevered, inherent in the reversion, severance will not alien it, nor the clause will not devest it.

To open therefore the nature of an inheritance: Sense teacheth there be of the soil and earth, parts that are raised and eminent, as timber-trees, rocks, houses. There be parts that are sunk and depressed, as mines which are called by some *arbores subterraneæ*, because that as trees have great branches and smaller boughs and twigs; so have they in their region greater and smaller veins: so if we had in *England* beds of *porcelane*, such as they have in *China*, which *porcelane* is a kind of a plaster buried in the earth, and by length of time congealed and glazed into that fine substance; this were as an artificial *mine*, and no doubt part of the inheritance. Then are there the ordinary parts, which make the mass of the earth as stone, gravel, loam, clay and the like.

Now as I make all these much in one degree, so there is none of them, not timber-trees, not quarries, not minerals or fossils, but hath a double nature; inheritable and real, while it is contained with the mass of the earth, and transitory and personal, when it is once severed. For even gold and precious stone, which is more durable out of earth than any tree is upon the earth; yet the law doth not hold of that dignity as to be matter of inheritance if it be once severed. And this is not because it becometh moveable, for

Nevel's case
proving there
are inheritan-
ces which are
not local.

The consent of
the law with
philosophy in
distinguishing
between per-
petual and
transitory.

there be moveable inheritances, as villains in gross, and dignities which are judged hereditaments; but because by their severance they lose their nature of perpetuity, which is of the essence of an inheritance.

AND herein I do not a little admire the wisdom of the laws of *England*, and the consent which they have with the wisdom of philosophy and nature itself; for it is a maxim in philosophy, that *in regione elementari nihil est aeternum, nisi per propagationem speciei, aut per successionem partium.*

AND it is most evident, that the elements themselves, and their products have a perpetuity not *in individuo*, but by supply and succession of parts; for example, the vestal fire, that was nourished by the virgins at *Rome*, was not the same fire still, but was in perpetual waste, and in perpetual renovation. So it is of the sea and waters, it is not the same water individually, for that exhales by the sun, and is fed again by showers. And so of the earth itself, and mines, quarries, and whatsoever it containeth, they are corruptible individually, and maintained only by succession of parts, and that lasteth no longer than they continue fixed to the main and mother-globe of the earth, and is destroyed by their separation.

ACCORDING to this I find the wisdom of the law by imitation of the course of nature to judge of inheritances, and things transitory; for it alloweth no portions of the earth, no stone, no gold, no mineral, no tree, no mold to be longer inheritance than they adhere to the mass, and so are capable of supply in their parts: for by their continuance of body stands their continuance of time.

NEITHER is this matter of discourse, except the deep and profound reasons of law, which ought chiefly to be searched, shall be accounted discourse, as the slighter sort of wits (*scioli*) may esteem them.

AND therefore now that we have opened the nature of inheritable and transitory, let us see upon

upon a division of estates, and before severance, what kind of interests the law allotteth to the owner of inheritance, and what to the particular tenant; for they be competitors in this case.

FIRST, in general the law doth assign to the lessor those parts of the soil conjoined, which have obtained the reputation to be durable, and of continuance, and such as being destroyed, are not but by long time renewed;) and to the *Termi-*
nors it assigneth such interests as are tender and feeble against the force of time, but have an annual or seasonable return or revenue.) And herein it consents again with the wisdom of the civil law; for our inheritance and particular estate is in effect there *dominium* and *usus-fructus*; for so it was conceived upon the ancient statute of depopulations 4 H. VII. which was penned, that the owner of the land should re-edify the houses of husbandry; that the word *Owner* (which answereth to *dominus*) was he that had the immediate inheritance, and so ran the later statutes. Let us see therefore what judgment the law maketh of a timber-tree; and whether the law doth not place it within the lot of him that hath the inheritance as parcel thereof.

FIRST it appeareth by the register out of the words of the writ of waste, that the waste is laid to be *ad exhaeredationem*, which presupposeth *hereditatem*: for there can't be a disinherison by the cutting down of the tree, except there was an inheritance in the tree, *quia privatio presupponit actum*.

AGAIN it appeareth out of the words of the statute of Gloucester well observed, that the tree and the foil are one entire thing, for the words are, *quod recuperet rem vastatam*; and yet the books speak, and the very judgment in waste is, *quod recuperet locum vastatum*, which shews, that *res* and *locus* are in exposition of law taken indifferently: for the lessor shall not recover only the stem of

The consent of
the law with
the civil law,
in the distin-
guishing be-
tween inheri-
tance and par-
ticular estates,
which hath re-
lation to their
division of du-
minium and u-
sus fructus.

Owner in the
statute of 4
H. 7.

The writ of
waste suppo-
seth the felling
timber to be
*ad exhaera-
tionem*.

The statute of
Gloucester,
*quod recuperet
rem vastatam,*
not *locum va-
statum*.

the tree, but he shall recover the very soil, whereunto the stem continues. And therefore it is notably ruled in 22 H. VI. f. 13. that if the *Terminor* do first cut down the tree, and then destroy the stem, the lessor shall declare upon two several wastes, and recover treble damages for them severally. But says the book he must bring but one writ, for he can recover the place wasted but once.

Mullin's case.

AND farther proof may be fitly alledged out of *Mullin's case* in the commentaries, where it is said, that for timber-trees tithes shall not be paid. And the reason of the book is well to be observed; for that tithes are to be paid for the revenue of the inheritance, and not for the inheritance itself.

NAY, my lords, it is notable to consider what a reputation the law gives to the trees, even after they are severed by grant, as may be plainly inferred out of *Herlackenden's case*, L. Coke p. 4. f. 62. Co. p. 4. f. 62.

I mean the principal case; where it is resolved; that if the trees being excepted out of a lease be granted to the lessee, or if the grantee of trees accept a lease of the land, the property of the trees drown not, as a term should drown in a freehold, but subsist as a chattel divided; which shews plainly, though they be made transitory; yet they still to some purposes favour of the inheritance: for if you go a little farther, and put the case of a *state tail*, which is a state of inheritance, then I think clearly they are reannexed. But on the other side, if a man buy corn standing upon the ground, and take a lease of the same ground, where the corn stands, I say plainly it is reaffixed, for *paria copulantur cum paribus*.

AND it is no less worthy the note what an operation the inheritance leaveth behind it in matter of waste, even when it is gone, as appeareth in the case of tenant after possibility, who shall not be punished; for though the new reason be,

because

because his estate was not within the statute of Gloucester; yet I will not go from my old Mr. Littleton's reason, which speaketh out of the depth of the common law, he shall not be punished for the inheritance sake which was once in him. 534.246

BUT this will receive a great deal of illustration, by considering the Terminor's estate, and the nature thereof, which was well defined by Mr. Heath (who spake excellent well to the case) that it is such as he ought to yield up the inheritance in as good plight, as he received it; and therefore the word *firmarius* (which is the word of the statute of Marlbridge) cometh, as I conceive, *a firmando*; because he makes the profit of the inheritance, which otherwise should be upon account, and uncertain, firm and certain; and accordingly *feodi firma* fee-farm is a perpetuity certain; Therefore the nature and limit of a particular tenant is to make the Inheritance certain, and not to make it worse.

1. THEREFORE he cannot break the soil otherwise than with his plough-share to turn up perhaps a stone, that lieth aloft; his interest is *in superficie* not *in profundo*, he hath but *tunicam* terra little more than the vesture.

If we had firr-timber here, as they have in Muscovy, he could not pierce the tree to make the pitch come forth, no more than he may break the earth.

So we see the evidence, which is *propugnaculum* The evidence
hereditatis, the fortress and defence of the land Propugnac-
lum heredita-
tis.

So the lessee's estate is not accounted of that dignity, that it can do homage, because it is a badge of continuance in the blood of lord and tenant. Neither for my own opinion can a particular tenant of a manor have aid *pur file marier, ou pur fere fits chevalier*; because it is given

The derivation
and force of
the word fir-
marius.

ven

ven by law upon an indictment of continuance of blood and privity between lord and tenant.

AND for the tree which is now in question, do but consider in what a revolution the law moves, and as it were in an orb: for when the tree is young and tender *germen terræ*, a sprout of the earth, the law giveth it to the lessee, as having a nature not permanent, and yet easily restored: when it comes to be a timber-tree, and hath a nature solid and durable, the law carrieth it to the lessor. But after again if it become a scurvy and a dotard, and its solid parts grow putrefied, and as the poet saith, *non jam mater alit tellus viresque ministrat*, then the law returns it back to the lessee. This is true justice, this is *suum cuique tribuere*; the law guiding all things with line of measure and proportion.

The phrase
that the lessee
hath a special
property in the
tree very im-
proper; for he
hath but the
profits of the
tree.

AND therefore that interest of the lessee in the tree, which the books call a special property, is scarce worth that name. He shall have the shade, so shall he have the shade of a rock; but he shall not have a crystal or *Bristol* diamond growing upon the rock. He shall have the pannage; why? that is the fruit of the inheritance of a tree, as herb or grass is of the soil. He shall have seasonable loppings; why? so he shall have seasonable diggings of an open mine. So as all these things are rather profits of the tree, than any special property in the tree. But about words we will not differ.

So as I conclude this part, that the reason and wisdom of law doth match things, as they consoft ascribing to permanent states permanent interest and to transitory states transitory interest; and you cannot alter this order of law by fancies or clauses and liberties, as I will tell you in the proper place. And therefore the tree standing belongs clearly to the owner of the inheritance.

Now come I to my second assertion, that by the severance the ownership or property cannot be altered; but that he, that had the tree as part of the inheritance before, must have it as a chattel transitory after. This is pregnant and followeth of itself, for it is the same tree still, and as the Scripture saith, *uti arbor cadit, ita jacet.*

THE owner of the whole must needs own the parts; he that owneth the cloth owneth the bread; and he that owneth an engine, when it is entire, owneth the parts when it is broken; breaking cannot alter property.

AND therefore the book in *Herlackenden's case* doth not stick to give it somewhat plain terms; and to say that it were an absurd thing, that the lessee, which hath a particular interest in the land, should have an absolute property in that which is part of the inheritance: you would have the shadow draw the body, and the twigs draw the trunk. These are truly called absurdities. And therefore in a conclusion so plain, it shall be sufficient to vouch the authorities without enforcing the reasons.

AND although the division be good, that was made by Mr. *Heath*, that there be four manners of severances, that is, when the lessee fells the tree, or when the lessor fells it, or when a stranger fells it, or when the act of God, a tempest fells it, yet this division tendeth rather to explanation than to proof; and I need it not, because I do maintain that in all these cases the property is in the lessor.

AND therefore I will use a distribution which rather presseth the proof. The question is of property. There be three arguments of property, damages, seizure, and grant; and according to these I will examine the property of the trees by the authority of books.

AND first for damages.

Three arguments of property, damages, seizure and grant.

CASE OF IMPEACHMENT OF WASTE.

FOR damages look into the books of the law, and you shall not find the lessee shall ever recover damages, not as they are a badge of property; for the damages, which he recovereth, are of two natures, either for the special property (as they call it) or as he is chargeable over. And for this to avoid length, I will select three books, one where the lessee shall recover treble damages, another where he shall recover but for his special property, and the third when he shall recover for the body of the tree, which is a special case, and standeth merely upon a special reason.

44 E. 3. f. 27.

THE first is the book of 44 E. III. f. 27. where it is agreed, that if tenant for life be, and a disseisor commit waste, the lessee shall recover in trespass as he shall answer in waste: but that this is a kind of recovery of damages, though *per accidens* may appear plainly.

FOR if the lessor die, whereby his action is gone, then the disseisor is likewise discharged, otherwise than for the special property.

9 E. 4. f. 35.

THE second book is 9 E. IV. f. 35. where it is admitted that if the lessor himself cut down the tree, the lessee shall recover but for his special profit of shade, pannage, loppings, because he is not charged over.

44 E. 3. f. 44.

THE third is 44 E. III. f. 44. where it is said, that if the lessee fell trees to repair the barn which is not ruinous, in his own default, and the lessor come and take them away, he shall have trespass, and in that case he shall recover for the very body of the tree, for he hath an absolute property in them for that intent.

38 Aff. f. 1.

AND that it is only for that intent appeareth notably by the book 38 Aff. f. 1. If the lessee after he hath cut down the tree employ it not to reparations, but employ other trees of better value, yet it is waste; which sheweth plainly the property is respective to the employment.

NAY

NAY 5 E. IV. f. 106. goeth farther and shew-
eth, that the special property which the lessee
had was of the living tree, and determines as Her-
ackenden's case saith by severance; for then *magis*
dignum trabit ad se minus dignum: for it saith,
that the lessee can't pay the workman's wages
with those parts of the tree which are not timber.
And so I leave the first demonstration of pro-
perty, which is by damages; except you will add
the case of 27 H. VIII. f. 13. where it is said, 27 H. 8. f. 13.
that if tenant for life and he in the reversion join
in a lease for years, and lessee for years fell tim-
ber trees, they shall join in an action of waste;
but he in the reversion shall recover the whole
damages: and great reason, for the special pro-
perty was in the lessee for years, the general in
him in the reversion, so the tenant for life mean
ad neither the one nor the other.

Now for the seizure you may not look for
sufficient authority in that: for the lessor, which
had the more beneficial remedy by action for tre-
ble damages, had little reason to resort to the
weaker remedy by seizure, and leases without im-
peachment were then rare, as I will tell you
soon. And therefore the question of the seizure
came chiefly in experience upon the case of the
windfalls, which could not be punished by action
of waste.

FIRST therefore the case of 40 E. III. pl. 22. 40 E. 3. pl. 22.
express, where at the King's suit in the behalf
of the heir of *Darcy* who was in ward, the King's
fee was questioned in waste, and justified the
king of the trees, because they were overthrown
by winds, and taken away by a stranger. But
neverthless, although one be guardian, yet the
lessee, when by their fall they are severed from
the freehold, he hath no property of the chattels,
but they appertain to the heir, and the heir shall
have trespasses of them against a stranger, and not
the guardian, no more than the bailiff of a
manor.

CASE OF IMPEACHMENT OF WASTE.

manor. So that that book rules the interest of the tree to be in the heir, and goes to appoint farther, that he shall have trespass for them; but of seizure there had been no question.

2 H. 7. f. 14.

So again in 2 H. VII. the words of Brian are that for the timber-trees the lessor may take them for they are his, and seemeth to take some difference between them and the gravel.

34 E. 3. f. 5.

THE like reason is of the timber of an house as appears 34 E. 3. f. 5. abridg'd by Brook, the waste, pl. 34. when it is said, it was doubted whether it should have the timber of a house which fell by tempest; and saith the book, it seems it doth appertain to the lessor; and good reason, for it is no waste, and the lessee is not bound to re-edify it: and therefore it is reason the lessor have it, but Herlackenden's case goes farther, where it is said that the lessee may help himself with the timber, if he will re-edify it; but clearly he has no interest but towards a special employment.

9 E. 4. f. 35.

Now you have had a case of the timber-trees and of the timber of the house, now take a case of the mine, where that of the trees is likewise put, and that is 9 E. IV. f. 35. where it is said by Needham, that if a lease be made of land wherein there is tin, or iron, or lead, or coals, or quarry, and the lessor enter and take the tin and other materials, the lessee shall punish him coming upon his land, but not for taking of such substances. And so of great trees: but D'Arcy goes farther, and saith, the law that gives him the thing, doth likewise give him means to come by it; but they both agree that the interest is in the lessor: and thus much for the seizure.

For the grant, it is not so certain a badge of property as the other two; for a man may have a property, and yet not grantable, because it is turned into a right, or otherwise suspended. Therefore it is true, that by the book in 21 H. f. that if the lessor grant the trees, the grant

rest of shall not take them, no not after the lease ex-
ppoin- pired ; because his property is but *de futuro, ex-*
n; bu *petant* ; but 'tis as plain on the other side that
ian at the lessee cannot grant them, as was resolved in
them and two notable cases, namely the case of *Marwood* Marwood and
e differ *Sanders* 41. *El. in communis banco*; where it was
ruled, that the tenant of the inheritance may
make a feoffment with exception of timber-trees;
house but that if lessee for life or years set over his e-
book, t state with an exception of the trees, the excep-
red wh tion is utterly void ; and the like resolution was
fell b in the case between *Foster* and *Mills* plaintiff, and Foster and
oth a *Spencer* and *Board* defendant, 28 *Eliz. rot.* 820. Spencer's case;

Now come we to the authorities, which have
re-edi- an appearance to be against us, which are not
have i many, and they be easily answered not by distin-
ere it guishing subtilly, but by marking the books ad-
with t uisely.

I. THERE be two books that seem to cross the
authorities, touching the interest of the wind-
ber-walls, 7 *H. VI.* and 44 *E. III. f. 44.* whereupon ^{7 H. 6. 44 E. 3.} _{{ 44.}
a c waste brought and assigned in the succision of
s likew trees, the justification is, that they were over-
it is s hrown by wind, and so the lessee took them for
of la fuel, and allowed for a good plea ; but these
coals, books are reconciled two ways, first look into both
the justifications, and you shall find that the plea
him did not rely only in that they were windfalls, but
ng of couples it with this, that they were first fear, and
ut Da been overthrown by wind ; and that makes an
gives b end of r, for fear trees belong to the lessee, stand-
; to co g or felled, and you have a special replication in
ereft is the book of 44. that the wind did but rend them,
e. and buckle them, and that they bore fruit two
badg years after. And 2dly, you have ill luck with your
may b windfalls, for they be still apple-trees which are
cause b wastes per *accidens*, as willows, or thorns are
led. In the sight of a house ; but when they are once
21 *H.* felled, they are clearly matter of fuel.

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*5 H. 4. f. 29.
1 Ma. f. 90.*

ANOTHER kind of authorities, that make shew against us, are those that say that the lessee shall punish the lessor in trespass for taking the trees, which are *5 H. IV. f. 29.* and *1 Mar. Dier, f. 90.* *Mervin's case;* and you might add, if you will, *9 E. IV.* the case vouched before; unto which the answer is, that trespass must be understood for the special property, and not for the body of the tree; for those two books speak not a word, what he shall recover, nor that it shall be to the value. And therefore *9 E. IV.* is a good expositor, for that distinguisheth where the other two books speak indefinitely; yea, but *5 H. IV.* goes farther, and saith, that the writ shall purport *arbores suas,* which is true in respect of the special property; neither are writs to be varied according to special cases, but are framed to the general case, as upon lands recovered in value in tail, the writ shall suppose *donum a gift.*

13 H. 7. f. 9.

AND the third kind of authority is some books (as *13 H. VII. f. 9.*) that say, that trespass lies not by the lessor against the lessee for cutting down trees, but only waste; but that is to be understood of trespass *vi & armis,* and would have come fitly in question, if there had been no seizure in this case.

UPON all which I conclude, that the whole current of authorities proveth the properties of the trees upon severance to be in the lessor by the rules of the common law; and that although the common law would not so far protect the folly of the lessor, as to give him remedy by action, where the state was created by his own act; yet the law never took from him his property; so that as to the property before the statute and since, the law was ever one.

Now come I to the third assertion, that the statute of Gloucester hath not transferred the property of the lessee upon an intendment of recompence to the lessor, which needs no long speech.

it is grounded upon a probable reason, and upon a special book.

THE reason is, that damages are a recompence for property: and therefore that the statute of Gloucester giving damages should exclude property; the authority seems to be 12 E. IV. f. 8. 12 E. 4. f. 8. where *Catesbey* affirming that the lessee at will shall have the great trees, as well as lessee for years or life: *Fairfax* and *Jennings* correct it with a difference, that the lessor may take them in the case of tenant at will; because he hath no remedy by the statute, but not in case of the termors.

THIS conceit may be reasonable thus far, that the lessee shall not both seise and bring waste; but if he seise, he shall not have his action; if he recover by action, he shall not seise: for a man shall not have both the thing and recompence; it is a bar to the highest inheritance (the kingdom of heaven) *recepereunt mercedem suam*. But at the first, it is at his election, whether remedy he will use, like as in the case of trespass; where if a man once recover in damages, it hath concluded and turned the property. Nay, I invert the argument upon the force of the statute of Gloucester thus: that if there had been no property at common law; yet the statute of Gloucester by restraining the waste, and giving an action, doth imply a property, where-to a better case cannot be put than the case upon the statute *de donis conditionalibus*, where there are no words to give any reversion or remainder; and yet the statute giving a *formedon*, where it lay not before, being but an action, implies an actual reversion and remainder.

THUS have I passed over the first main part, which I have insisted upon the longer, because I shall have use of it for the clearing of the second.

Now to come to the force of the clause, *absque competitione vasti*. This clause must of necessity work in one of these degrees, either by way of

A statute gi-
ving an action
implieh an in-
terest.

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grant of property, or by way of power and liberty knit to the state, or by way of discharge of action; whereof the first two I reject, the last I receive.

No grant of property.

1. THEREFORE I think the other side will not affirm, that this clause amounts to a grant of trees; for then, according to the resolution in *Herrickenden's case*, they should go to the executors, and the lessee might grant them over, and they might be taken after the state determined. Now it is plain that this liberty is created with the estate, passeth with the estate, and determines with the estate.

5 H. 5.

THAT appears by 5 Hen. V. where it is said, that if lessee for years without impeachment of waste accept a confirmation for life, the privilege is gone.

3 E. 3.
28 H. 8.

AND so are the books in 3 E. III. and 28 H. VIII. that if a lease be made without impeachment of waste *pur autre vie*, the remainder to the lessee for life, the privilege is gone, because he is in of another estate; so then plainly it amounts to no grant of property, neither can it any way touch the property, nor enlarge the especial property of the lessee; for will any man say, that if you put *Marwood and Sanders's case* of a lease without impeachment of waste, that he may grant the land with the exception of the trees any more than an ordinary lessee. Or shall the windfalls be more his in this case, than in the other? for he was not impeachable of waste for windfalls no more than where he hath the clause. Or will any man say, that if a stranger commit waste, such a lessee may seise? these things I suppose no man will affirm. Again, why should not a liberty or privilege in law be as strong as a privilege in fact? as in the case of tenant after possibility: Or where there is a lessee for life, the remainder for life? for in these cases they are privileged from waste, and yet that trenches not the property.

Now therefore to take the second course, that it should be as a real power annexed to the state;

neither

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neither can that be, for it is the law that moldeth estates, and not mens fancies. And therefore, if men by clauses like voluntaries in musick run not upon the grounds of law, and do restrain an estate more than the law restrains it, or enables an estate more than the law enables it, or guides an estate otherwise than the law guides it, they be mere repugnancies and vanities. And therefore, if I make a feoffment in fee, provided the feoffee shall not fell timber, the clause of condition is void. And so on the other side, if I make a lease with a power that he shall fell timber, it's void.

So if I make a lease with a power that he may make feoffment, or that he may make leases for forty years, or that if he make default, I shall not be received, or that the lessee may do homage; these are plainly void, as against law, and repugnant to the state. No, this cannot be done by way of use, except the words be apt, as is *Mildmay's case*: neither is this clause, in the sense that they take it, any better.

THEREFORE laying aside these two constructions, whereof the one is not maintained to be, the other cannot be: let us come to the true sense of this clause, which is by way of discharge of the action, and no more; wherein I will speak first of the words, then of the reason, and of the authorities which prove our sense, then of the practice, which is pretended to prove theirs; and lastly, I will weigh the mischief how it stands for our construction or theirs.

It is an ignorant mistaking of any man to take impeachment for *Impedimentum*, and not for *impeditio*, for it is true that *impedimentum* doth extend to all hindrances, or disturbances, or interruptions, as well in *pais* as judicial. But *impeditio* is merely a judicial claim, or interruption by suit in law, and upon the matter all one with *implacatio*. Wherein first we may take light of

the derivation of *impeditio*, which is a compound of the preposition *in*, and the verb *peto*, where of the verb *peto* itself doth signify a demand, but yet properly such a demand as is not *extra-judicial*: for the words *petit judicium*, *petit auditum brevis*, &c. are words of acts judicial; as for the demand in *pais*, it is rather *requisitio* than *petitio*, as *licet saepius requisitus*; so much for the verb *peto*. But the preposition *in* enforceth more, which signifies against, as *Cicero in Verrem*, *in Catilinam*, and so in composition, to inveigh to speak against: so it is such a demand only where there is a party raised to demand against that is an adversary, which must be in a suit in law; and it is used in records of law.

As Coke lib. 1. f. 17. Porter's case, it was pleaded in bar, that *ditta domina Regina nunc ipsum Johannem & Henricum Porter petere seu occasionare non debet*, that is *implacitare*.

So likewise Coke l. 1. f. 27. case of *Alton woods* *quod ditta domina regina nunc ipsum proinde aliquiter impetrere seu occasionare non debet*.

So in the book of entries f. 1. litera D. 17. H. VII. rot. 2. *inter placita Regis*, & super hoc ver N. B. *Comonachus abbatis W. loci illius ordinari gerensque vices ipsius abbatis, ad quoscunque cleric de quolibet criminie coram Domino Rege impedit irritat calumniand*. So much *ex vi & usu i mtni*.

FOR reason; first, it ought to be considered that the punishment of waste is strict and severe because the penalty is great, treble damages, and the place wasted: and again, because the lessor must undertake for the acts of strangers: whereupon I infer, that the reason which brought the clause in use, *ab initio*, was caution to save, and to free men from the extremity of the penalty, and not any intention to countermand the property.

ADD to this that the law doth assign in most cases double remedy, by matter of suit and matter in *pais* for disseisings, actions, entries, for trespasses, action and seizure, for nuisances, action and abatement; and as *Littleton* doth instruct us, one of these remedies may be released without touching the other. If the disseisee release all actions, saith *Littleton*, yet my entry remains; but if I release all demands or remedies, or the like words of a general nature, it doth release the right itself. And therefore I may be of opinion, that if there be a clause of grant in my lease express'd, that if my lessee or his assigns cut down and take away any timber-trees, that I and my heirs will not charge them by action, claim, seizure, or other interruption, either this shall secure by way of covenant only, or if you take it to secure by way of absolute discharge, it amounts to a grant of property in the trees, like as the case of *Affif.* I grant, that if I pay not you 10*l. per annum* at such feasts, you shall distrain for it in my manor of *Dale*, tho' this sound executory in power, yet it amounts to a present grant of a rent. So as I conclude that the discharge of action on the law knows, grant of the property the law knows, but this same mathematical power being a power amounting to a property, and yet property, and knit to a state that cannot bear the law knoweth not, *tertium penitus ignoramus*: for the authorities they are of three kinds, 1. by inference, and the third direct.

^{31 Affif.}
A clause that
sounds to a
power, a-
mounts to a
property, if the
state bear it.

THE first I do collect upon the books of 42 ^{42 E. 3. f. 23.}
^{24.} *dw. III. f. 23, and 24.* by the difference taken ^{24.}
Mowbray, and agreed by the court, that the law doth intend the clause of disimpeachment of waste to be a discharge special, and not general absolute; for there the principal case was, that there was a clause in the lease, that the lessor could not demand any right, claim, or challenge the lands during the life of the lessee. It is

resolved by the book, that it is no bar in waste; but that if the clause had been that the lessee should not have been impeached for waste, clearly a good bar; which demonstrates plainly, that general words, be they never so loud and strong, bear no more than the state will bear, and to any other purpose are idle. But special words that inure by way of discharge of action, are good and allowed by law.)

4 E. 2. Fitzh.
tit. waste 15.
17 E. 3. f. 7.
Fitzh. tit.
waste, 101.

THE same reason is of the books 4 Ed. II. Fitzb. tit. waste 15, and 17 E. III. f. 7. Fitzb. tit. waste 101. where there was a clause, *Quod liceat facere commodum suum meliori modo quo poterit.* Yet saith *Skipwith*, doth this amount, that he shall for the making of his own profit disinherit the lessor? *Nego consequentiam*; so that still the law allows not of the general discharge, but of the special that goeth to the action.

9 H. 6. f. 35.
Fitzh. tit.
waste 39.
32 H. 8. Dyer
f. 47.

THE second authority by inference is out of 9 H. VI. f. 35. Fitzb. tit. waste 39. and 32 H. VIII. Dyer f. 47. where the learning is taken, that notwithstanding this clause be inserted into a lease, yet a man may reserve unto himself remedy by entry: but say I, if this clause should have that sense, which they on the other side would give it; namely, that it should amount to an absolute privilege and power of disposing, then were the proviso flat repugnant, all one as if it were *absque impetitione vasti*, *proviso quod non faciet vastum* which are contradictories; and note well that in the book of 9 H. VI. the proviso is *quod non faciat vastum voluntarium in domibus*; which indeed doth abridge in one kind, and therefore may stand without repugnancy: but in the latter book it is general, that is to say, *absque impetitione vasti*, *si contigerit ipsum facere vastum tunc licebit reintare*. And there *Shelly* making the objection that the condition was repugnant, it is *salv'd* thus *sed aliqui temuerunt*, that this word *impetitione vasti* is to be understood that he shall not be implead

ed by waste, or punished by action, and so indeed it ought : Those aliqui recte tenuerunt.

FOR the authorities direct, they are two, the one ^{27 H. VI. Fitzb.} _{tit. waste 8.} where a lease was made without impeachment of waste, and a stranger committed waste, and the rule is, that the lessee shall recover in trespass only for the crop of the tree, and not for the body of the tree. It is true it comes by a *dicitur*, but it is now a legitur; and a *quere* there is, and reason, or else this long speech were time ill spent.

AND the last authority is the case of Sir *Moyle Finch* and his mother, referred to my lord *Wrey* and Sir *Roger Manwood*, resolved upon conference with other of the judges vouch'd by *Wrey* in *Herrickenden's case*, and reported to my lord chief justice, here present, as a resolution of law, being our very case.

AND for the cases to the contrary, I know not one in all the law direct: they press the statute of *Marlebridge*, which hath an exception in the prohibition, *firmarii non facient vastum, &c. nisi specialem inde habuerint concessionem per scriptum conventionis, mentionem faciens, quod hoc facere possint*, This presseth not the question; for no man doubteth, but it will excuse in an action of waste; and again, *nisi habeant specialem concessionem* may be meant of an absolute grant of the trees themselves: and otherwise the clause *absque impietione vasti* taketh away the force of the statute, and looseth what the statute bindeth; but it toucheth not the property at common law.

FOR *Littleton's* case in his title of conditions, *Littleton.*
352.
Co. 2162.
the leaf =
for.

where it is said, that if a feoffment in fee be made upon condition, that the feoffee shall infest the husband and wife, and the heirs of their two bodies; and that the husband die, that now the feoffee ought to make a lease without impeachment of waste to the wife, the remainder to the right heirs of the body of her husband, and her

CASE OF IMPEACHMENT OF WASTE.

begotten ; whereby it would be inferred, that such a lessee should have equal privilege with tenant in tail : the answer appears in Littleton's own words, which is, that the feoffee ought to go as near the condition, and as near the intent of the condition as he may, but to come near is not to reach, neither doth Littleton undertake for that.

Culpepper's
case.

2 Eliz.

Dyer f. 184.

As for Culpepper's case, 2 Eliz. f. 184 it is obscurely put and concluded in division of opinion ; but yet so as it rather makes for us. The case is 2 Eliz. Dyer f. 184. and is in effect this : a man makes a lease for years, excepting timber-trees, and afterwards makes a lease without impeachment of waste to John a Style, and then granteth the land and trees to John a Down, and binds himself to warrant and save harmless John a Down against John a Style ; John a Style cutteth down the trees, the question was whether the bond were forfeited, and that question referteth to the other question ; whether John a Style, by virtue of such lease, could fell the trees ; and held by Weston and Brown that he could not ; which proves plainly for us that he had no property by that clause in the tree ; though it is true that in that case the exception of the trees turneth the case, and so in effect it proveth neither way.

Practice.

15 E. 2.

For the practice, if it were so ancient and common, as is conceived ; yet since the authorities have not approved, but condemned it, it is no better than a popular error ; it is but *pedum visa est via*, not *recta visa est via*. But I conceive it to be neither ancient nor common. It is true I find at first in 19 E. II. (I mean such a clause) but it is one thing to say that the clause is ancient ; and it is another thing to say, that this exposition, which they would now introduce, is ancient. And therefore you must note that a practice doth then expound the law, when the act which is practised, were merely tortious or void, if the law should not approve it ; but that is not

the

the case here ; for we agree the clause to be lawful : nay, we say that it is in no sort *inutile*, but there is use of it, to avoid this severe penalty of treble damages. But to speak plainly, I will tell you how this clause came in from 13 of E. I. till about 12 of E. IV. The *statute tail* though it had the qualities of an inheritance, yet it was without power to alien ; but as soon as that was set at liberty by common recoveries, then there must be found some other device, that a man might be an absolute owner of the land for the time, and yet not enabled to alien, and for that purpose was this clause found out : for you shall not find in one amongst an hundred, that farmers had it in their leases ; but those that were once owners of the inheritance, and had put it over to their sons or next heirs, reserved such a beneficial state to themselves. And therefore the troth is, that the flood of this usage came in with perpetuities, save that the perpetuity was to make an inheritance like a stem for life, and this was to make a stem for life like an inheritance, both concurring in this, that they presume to create phantaftical estates, contrary to the ground of law.

AND therefore it is no matter, though it went out with the perpetuities, as it came in, to the end that men that have not the inheritance should not have power to abuse the inheritance.

AND for the mischief and consideration of *bonum publicum*, certainly this clause with this exposition tendeth but to make houses ruinous, and to leave no timber upon the ground to build them up again ; and therefore let men in God's name, when they establish their states, and plant their sons or kinsmen in the inheritance of some portions of their lands, with reservation of the freehold to themselves, use it, and enjoy it in such sort, as may tend *ad ædificationem*, and not *ad destructionem* ; for that's good for posterity, and for the state in general.

AND

AND for the timber of this realm, 'tis *vivus thesaurus regni*; and 'tis the matter of our walls, walls not only of our houses, but of our island: so as 'tis a general disinherison to the kingdom to favour that exposition, which tends to the decay of it, being so great already; and to favour waste when the times themselves are set upon waste and spoil. Therefore since the reason and authorities of law, and the policy of estate do meet, and that those that have, or shall have such conveyances, may enjoy the benefit of that clause to protect them in a moderate manner, that is, from the penalty of the action; it is both good law and good policy for the kingdom, and not injurious or inconvenient for particulars, to take this clause strictly, and therein to affirm the last report; and so I pray judgment for the plaintiff.

The ARGUMENT in

LOWES CASE O F TENURES:

In the KING's BENCH.

THE manor of Alderwasley parcel of the Duchy, and lying out of the county *Palatine* was (before the Duchy came to the crown) held of the King by knight-service *in capite*. The land in question was held of the said manor

manor in socage. The Duchy and this manor parcel thereof descended to King Henry IV. King Henry VIII. by letters patent the 19. of his reign granted this manor to *Antbony Low*, grandfather of the ward, and then tenant of the land in question, reserving 26*l.* 10*s.* rent and fealty, *tantum pro omnibus serviciis*, and this patent is under the Duchy-seal only. The question is how this tenancy is held, whether in *capite* or in *socage*.

THE case resteth upon a point, unto which all the questions arising are to be reduced. The first is, whether this tenancy being by the grant of the King of the manor to the tenant, grown to an unity of possession with the manor, be held as the manor is held, which is expressed in the patent to be in *socage*.

THE second, whether the manor itself be held in *socage* according to the last reservation; or in *capite* by revivor of the ancient seigniory, which was in *capite* before the Duchy came to the crown.

THEREFORE my first proposition is, that this tenancy (which without all colour is no parcel of the manor) cannot be comprehended within the tenure, reserved upon the manor, but that the law createth a several and distinct tenure thereupon; and that not guided according to the express tenure of the manor; but merely *secundum normam legis*, by the intendment and rule of law, which must be a tenure by knight-service *in capite*.

AND my second proposition is, that admitting that the tenure of the tenancy should ensue the tenure of the manor: yet nevertheless the manor itself which was first held of the crown in *capite*, the tenure suspended by the conquest of the Duchy to the crown, being now conveyed out of the crown under the Duchy-seal only; (which hath no power to touch or carry any interest, whereof

whereof the King was vested in right of the crown) is now so severed and disjoined from the ancient seigniory, which was in *capite*, as the same ancient seigniory is revived, and so the new reservation void; because the manor cannot be charged with two tenures.

The King's tenures may take more hurt by a resolution in law than by many suppressions or concealments.

THIS case concerneth one of the greatest and fairest flowers of the crown, which is the King's tenures, and that in their creation; which is more than their preservation: for if the rules and maxims of law in the first raising of tenures in *capite* be weakened, this nips the flower in the bud, and may do more hurt by a resolution in law than the losses, which the King's tenures do daily receive by oblivion or suppression, or the neglect of officers, or the iniquity of jurors, or other like blasts, whereby they are continually shaken: and therefore it behoveth us of the King's council to have a special care of this case, as much as in us is, to give satisfaction to the court. Therefore, before I come to argue these two points particularly, I will speak something of the Favour of law towards tenures *in capite*, as that which will give a force and edge to all that I shall speak afterwards.

No land in the kingdom of England charged by way of tribute, and all land charged by way of tenure.

THE constitution of this kingdom appeareth to be a free monarchy in nothing better than in this; that as there is no land of the subject that is charged to the crown by way of tribute, or tax, or tallage, except it be set by parliament: so on the other side there is no land of the subject, but is charged to the crown by tenure, mediate or immediate, and that by the grounds of the common law. This is the excellent temper and commixture of this estate, bearing marks of the sovereignty of the King, and of the freedom of the subject from tax, whose possessions are *feodalia*, nor *tributaria*.

TENURES, according to the most general division, are of two natures, the one containing matter

ter of protection, and the other matter of profit: that of protection is likewise double, divine protection and military. The divine protection is chiefly procured by the prayers of holy and devout men; and great pity it is that it was depraved and corrupted with superstition. This begot the tenure in frankalmoigne, which though in burthen it is less than in socage, yet in virtue it is more than knight-service. For we read how, during the while *Moses* in the mount held up his hands, the *Hebrews* prevailed in battle, as well as when *Elias* prayed, rain came after drought, which made the plough go; so that I hold the tenure in frankalmoigne in the first institution indifferent to knight-service and socage. Setting apart this tenure, there remaineth the other two, that of knight-service, and that of socage; the one tending chiefly to defence and protection, the other to profit and maintenance of life. They are all three comprehended in the ancient verse, *Tu semper ora, tu protege, tuque labora.* But between these two services, knight-service and socage, the law of *England* makes a great difference: for this kingdom (my lords) is a state neither effeminate, nor merchant-like; but the laws give the honour unto arms and military service, like the laws of a nation, before whom *Julius Cesar* turned his back, as their own prophet says; *Territa quae sitis ostendit terga Britannis.* And therefore howsoever men upon husband-like considerations of profit esteem of socage tenures: yet the law that looketh to the greatness of the kingdom, and proceedeth upon considerations of estate, giveth the preheminence altogether to knight-service.

We see that the ward, who is ward for knight-service-land, is accounted in law disparaged, if he be tender'd a marriage of the burghers parentage: and we see that the knights fees were by the ancient laws the materials of all nobility; for that

it

LOWE'S CASE OF TENURES.

it appears by diverse records how many knights fees should by computation go to a barony, and so to an earldom. Nay we see that in the very summons of parliament, the knights of the shire are required to be chosen *milites gladio cincti*; so as the very call, though it were to council, bears a mark of arms and habiliments of war. To conclude, the whole composition of this war-like nation, and the favours of law tend to the advancement of military virtue and service.

BUT now farther, amongst the tenures by knight-service, that of the King *in capite* is the most high and worthy; and the reason is double; partly because it is held of the King's crown and person; and partly because the law createth such a privity between the line of the crown and the inheritors of such tenancies, as there cannot be an alienation without the King's licence, the penalty of which alienation was by the common law the forfeiture of the state itself, and by the statute of E. III. is reduced to fine and seizure. And although this also has been unworthily termed by the vulgar (not *capite*,) captivity and thraldom; yet that which they count bondage, the law counterth honour, like to the case of tenants in tail of the King's advancement, which is a great restraint by the statute of 34 H. VIII. but yet by that statute it is imputed for an honour. This favour of law to the tenure by knight-service *in capite* produceth this effect, that wheresoever there is no express service effectually limited, or wheresoever that, which was once limited, faileth, the law evermore supplieth a tenure by knight-service *in capite*; if it be a blank once—that the law must fill it up, the law ever with her—own hand writes—tenure by knight-service *in capite*. And therefore the resolution was notable by the judges of both benches, that where the King confirmed to his farmers tenants for life, *tenend' per servicia debita*, this was a te-

nure *in capite*: for other services are *servicia re quista*, required by the words of patents or grants; but that only is *servicium debitum*, by the rules of law.

THE course therefore that I will hold in the proof of the first main point, shall be this. First I will shew, maintain, and fortify my former grounds, that wheresoever the law createth the tenure of the King, the law hath no variety, but always raiseth a tenure *in capite*.

SECONDLY, that in the case present, there is not any such tenure expressed, as can take place, and exclude the tenure in law, but that there is as it were a lapse to the law.

AND lastly, I will shew in what cases the former general rule receiveth some shew of exception; and will shew the difference between them and our case; wherein I shall include an answer to all that hath been said on the other side.

FOR my first proposition I will divide into four branches: first, I say, where there is no tenure reserved, the law createth a tenure *in capite*; secondly, where the tenure is uncertain; thirdly, where the tenure reserved is impossible or repugnant to law; and lastly, where a tenure once created is afterwards extinct.

For the first, if the King give lands and say nothing of the tenure, this is a tenure *in capite*; Per Prisott in fine. 33 H. 6. f. 7. 8 H. 7. f. 3. q. Nay, if the King give white-acre and black-acre, and reserves a tenure only of white-acre, and that tenure expressed to be in socage; yet you shall not for fellowship sake (because they are in one patent) intend the like tenure of black-acre; but that shall be held *in capite*.

So if the King grant land, held as of a manor with warranty, and a special clause of recompence, and the tenant be impleaded, and recover in value, this land shall be held *in capite*, and not of the manor.

So if the King exchange the manor of *Dale* for the manor of *Sale*, which is held in socage, although it be by the words *excambium*; yet that goeth to equality of the state, not of the tenure, and the manor of *Dale* (if no tenure be expressed) shall be held *in capite*; so much for silence of tenure.

For the second branch, which is uncertainty of tenure; first, where an *ignoramus* is found by office; this by the common law is a tenure *in capite*, which is most for the King's benefit; and the presumption of law is so strong, that it amounts to a direct finding or affirmative, and the

5 Mar. Dyer f.
14 Eliz. Dyer
306.

party shall have a negative or traverse, which is somewhat strange to a thing indefinite.

So if in ancient time, one held of the King, as of a manor by knight-service, and the land return to the King by attainer, and then the King granteth it *tenend' per fidelitatem tantum*, and it returneth the second time to the King, and the Austin's office. King granteth it *per servicia antebac consueta*; now because of the uncertainty, neither service shall take place, and the tenure shall be *in capite*, as was the opinion of you my lord chief justice, where you were commissioner to find an office after *Austin's* death.

So if the King grant land *tenend' de manerio de East-Greenwich*; *vel de honore de Hampton*; this is void, for the non-certainty, and shall be held of the King *in capite*.

33 H. 6. f. 7.

For the third branch, if the King limit land to be discharged of tenure, as *absque aliquo inde reddendo*, this is a tenure *in capite*; and yet if one should go to the next, *ad proximum*, it should be a socage, for the least is next to none at all: but you may not take the King's grant by argument; but where they cannot take place effectually and punctually, as they are expressed, there you shall resort wholly to the judgment of law.

So if the King grant land *tenend' si franckment* ^{14 H. 6. f. 12.}
come il est son corone, this is a tenure *in capite*.

If land be given to be held of a lordship not ^{Merefeld's case.} capable, as of *Salisbury plain*, or a corporation not *in esse*, or of the manor of a Subject, this is a tenure *in capite*.

So if land be given to hold by impossible service, as by performing the office of the sheriff of *Torkshire* (which no man can do but the sheriff) and fealty for all service, this is tenure *in capite*.

FOR the fourth branch, which cometh nearest to our case; let us see where a seigniory was once, and is after extinguished; this may be in two manners, by release in fact, or by unity of possession, which is a release or discharge in law.

AND therefore let the case be that the King releaseth to his tenant, that holds of him in *focage*; this release is good, and the tenant shall hold now *in capite*, for the former tenure being discharged, the tenure in law ariseth.

So the case, which is in *E. III.* a fine is levied to *J. S.* in tail, the remainder ouster to the King, the state tail shall be held *in capite*, and the first tenancy, if it were in *focage*, by the unity of the tenancy, shall be discharged, and a new raised thereupon: and therefore the opinion, or rather the *quære* in *Dyer*, no law.

THUS much for my major proposition, now for the minor, or the assumption, it is this: first, that the land in question is discharged of tenure by the purchase of the manor; then that the reservation of the service upon the manor cannot possibly inure to the tenancy; and then if a corruption be of the first tenure, and no generation of the new; then cometh in the tenure *per norman legis*, which is *in capite*.

AND the course of my proof shall be *ab enumeratione partium*, which is one of the clearest and most forcible kinds of argument.

If this parcel of land be held by fealty and rent *tantum*, either it is the old fealty before the purchase of the manor, or it is the new fealty reserved and expressed upon the manor; or it is a new fealty raised by intendment of law in conformity and congruity of the fealty reserved upon the manor; but none of these; *ergo, &c.*

THAT it should be the old fealty, is void of sense; for it is not *ad eosdem terminos*. The first fealty was between the tenancy and the manor, that tenure is by the unity extinct. Secondly, that was a tenure of a manor, this is a tenure in gross. Thirdly, the rent of 26*l.* 10*s.* must needs be new, and will you have a new rent with an old fealty? These things are *portentia in lege*; nay, I demand, if the tenure of the tenancy (*Lowes* tenure) had been by knight-service, would you have said that had remained? No, but that it was altered by the new reservation; *ergo* no colour of the old fealty.

THAT it cannot be the new fealty is also manifest; for the new reservation is upon the manor, and this is no part of the manor; for if it had escheated to the King in an ordinary escheat, or come to him upon a *mortmain*, in these cases it had come in lieu of the seigniory, and been parcel of the manor, and so within the reservation, but clearly not upon a purchase in fact.

AGAIN, the reservation cannot inure, but upon that which is granted; and this tenancy was never granted, but was in the tenant before; and therefore no colour it should come under the reservation. But if it be said, that nevertheless the seigniory of that tenancy was parcel of the manor, and is also granted; and although it be extinct in substance, yet it may be *in esse* as to the King's service: this deserveth answer; for this assertion may be colourably inferred out of Carr's case.

KING *Edw. VI.* grants a manor, rendering 94*l.* rent in fee-farm *tenendum de East-Greenwich* in socage; and after, Queen *Mary* granteth these rents amongst other things *tenendum in capite*, and the grantee released to the heir of the tenant; yet the rent shall be *in esse*, as to the King, but the land (saith the book) shall be devisable by the statute for the whole, as not held *in capite*. 32 & 34. H. 8. 26 Aff.

AND so the case of the honour of *Pickeringe*, where the King granted the bailiwick, rendering rent; and after granted the honour, and the bailiwick became forfeited, and the grantee took forfeiture thereof; whereby it was extinct, yet the rent remaineth as to the King out of the bailiwick extinct.

THESE two cases partly make not against us, and partly make for us: there be two differences that avoid them. First, there the tenures or rents are *in esse* in those cases for the King's benefit, and here they should be *in esse* to the King's prejudice, who should otherwise have a more beneficial tenure. Again, in these cases the first reservation was of a thing *in esse*, at the time of the reservation; and then there is no reason the act subsequent of the King's tenant should prejudice the King's interest once vested and settled: but here the reservation was never good, because it is out of a thing extinct in the instant.

BUT the plain reason, which turneth *Carr's* case mainly for us, is; for that where the tenure is of a rent or seigniory, which is afterwards drowned or extinct in the land; yet the law judgeth the same rent or seigniory to be *in esse*, as to support the tenure: but of what? only of the said rent or seigniory, and never of the land itself? for the land shall be held by the same tenure it was before. And so is the rule of *Carr's* case, where it is adjudged, that though the rent be held *in capite*, yet the land was nevertheless

deviseable for the whole, as no ways charged with that tenure.

WHY then in our case, let the fealty be reserved out of the seigniory extinct, yet that toucheth not at all the land : and then of necessity the land must be also held ; and therefore you must seek out a new tenure for the land, and that must be *in capite*.

AND let this be noted once for all, that our case is not like the common cases of a menalty extinct, where the tenant shall hold of the lord, as the mean held before; as where the menalty is granted to the tenant, or where the tenancy is granted to the mean, or where the menalty descendeth to the tenant, or where the menalty is forejudged. In all these cases the tenancy, I grant, is held as the menalty was held before, and the difference is because there was an old seigniory in being ; which remaineth untouched and unaltered, save that it is drawn a degree nearer to the land, so as there is no question in the world of a new tenure: but in our case there was no lord paramount, for the manor itself was in the crown, and not held at all, nor no seigniory of the manor *in esse*, so as the question is wholly upon the creation of a new seigniory, and not upon the continuance of an old.

For the third course, that the law should create a new distinct tenure by fealty of this parcel, guided by the express tenure upon the manor ; it is the probablest course of the three : but yet if the former authorities, I have alleged, be well understood and marked, they shew the law plainly, that it cannot be ; for you shall ever take the King's grant *ad idem*, and not *ad simile*, or *ad proximum* : no more than in the case of the *absque aliquo reddendo*, or as free as the crown ; who would not say that in those cases it should amount to a socage tenure ? for *minimum est nihil proximum*; and yet they are tenures by King's service
in

in capite. So if the King by one patent pass two acres, and a fealty reserved but upon the one of them, you shall not resort to this *ut expressum servitium regat, vel declareret tacitum.* No more shall you in our case imply that the express tenure reserved upon the manor shall govern or declare the tenure of the tenancy, or controul the intendment of law concerning the same.

Now will I answer the cases, which give some shadow on the contrary side, and shew they have their particular reasons, and do not impugn our case.

FIRST, if the King have land by attainder of treason, and grant the land to be held of himself, and of other lords, this is no new tenure *per normam legis communis*; but the old tenure *per normam statuti*, which taketh away the intendment of the common law; for the statute directeth it so, and otherwise the King shall do a wrong.

So if the King grant land parcel of the demesne of a manor *tenendum de nobis*, or reserving no tenure at all, this is a tenure of the manor, or of the honour, and not *in capite*: for here the more vehement presumption controuleth the less; for the law doth presume the King hath no intent to dismember it from the manor, and so to lose his court and the perquisites.

So if the King grant land *tenendum* by a rose *pro omnibus servitiis*; this is not like the cases of the *absque aliquo inde reddendo*, or as free as the crown: for *pro omnibus servitiis* shall be intended ^{25 H. 6. f. 56.} for all express service; whereas fealty is incident,^{9.} and passeth tacit, and so it is no impossible or repugnant reservation.

THE case of the frankalmoigne, I mean the case where the King grants lands of the Templars to J. S. to hold as the Templars did, which cannot be frankalmoigne, and yet hath been ruled to be no tenure by knight-service *in capite*, but <sup>This is no
frankal-
moigne.</sup> ^{Wood's case;}

only a socage tenure, is easily answered; for that the franckalmoigne is but a *species* of a tenure in socage with a privilege, so the privilege ceaseth, and the tenure remains.

To conclude therefore, I sum up my arguments thus; my major is, where *calamus legis* doth write the tenure, it is knight-service *in capite*. My minor is, this tenure is left to the law; ergo this tenure is *in capite*.

FOR the second point I will first speak of it according to the rules of the common law, and then upon the statutes of the Duchy.

FIRST I do grant, that where a seigniory and a tenancy, or a rent and land, or trees and land, or the like primitive and secondary interest are conjoined in one person, yea, though it be *in auter droit*; yet if it be of like perdurable estate, they were so extinct, as by act in law they may be revived, but by grant they cannot.

FOR if a man have a seigniory in his own right, and the land descend to his wife, and his wife dieth without issue, the seigniory is revived; but if he will make a feoffment in fee, saving his rent, he cannot do it. But there is a great difference, and let it be well observed between *auter capacie* and *auter droit*; for in case of *auter capacie* the interests are *contigua*, and not *continua*, conjoined, but not confounded. And therefore if the master of an hospital have a seigniory, and the mayor and commonalty of *St. Albans* have a tenancy, and the master of the hospital be made mayor, and the mayor grant away the tenancy under the seal of the mayor and commonalty, the seigniory of the hospital is revived.

So between natural capacity and politick, if a man have a seigniory to him and his heirs, and a Bishop is tenant, and the lord is made Bishop, and the Bishop before the statute grants away the land under the chapter's seal, the seigniory is revived.

THE

THE same reason is between the capacity of the crown and the capacity of the Duchy, which is in the King's natural capacity, though illustrate with some privileges of the crown; if the King have the feigniory in the right of his crown, and the tenancy in the right of the Duchy (as our case is) and make a feoffment of the tenancy, the tenure must be revived; and this is by the ground of the common law. But the case is the more strong by reason of the statute of 1 H. IV. 3 H. V. and 1 H. VII. of the Duchy, by which the Duchy-seal is enabled to pass lands of the Duchy, but no ways to touch the crown; and whether the King be in actual possession of the thing, that should pass, or have only a right, or a condition, or a thing in suspence (as our case is) all is one; for that seal will not extinguish so much as a spark of that which is in the right of the crown; and so a plain revivor.

AND if it be said that a mischief will follow; for that upon every Duchy patent men shall not know how to hold, because men must go back to the ancient tenure, and not rest in the tenure limited: for this mischief there grows an easy remedy, which likewise is now in use, which is to take both seals, and then all is safe.

SECONDLY, as the King cannot under the Duchy-seal grant away his ancient feigniory in the right of his crown; so he cannot make any new reservation by that seal, and so of necessity it falleth to the law to make the tenure: for every reservation must be of the nature of that that passeth, as a Dean and Chapter cannot grant land of the Chapter, and reserve a rent to the Dean and his heirs, nor *& converso*: nor no more can the King grant land of the Duchy under that seal, and reserve a tenure to the crown; and therefore it is warily put in the end of the case of the Duchy in the commentaries, where it is said, if the King make a feoffment of the Duchy land,

LOWE'S CASE OF TENURES.

the feoffee shall hold *in capite*; but not a word of that, it should be by way of express reservation, but upon a feoffment simply, the law shall work it and supply it.

To conclude, there is direct authority in the point, but that it is *via versa*; and it was the Bishop of *Salisbury's* case; the King had in the right of the Duchy a rent issuing out of land, which was monastery land, which he had in the right of the crown, and granted away the land under the great seal to the Bishop; and yet nevertheless the rent continued to the Duchy, and so upon great and grave advice it was in the Duchy decreed; so as your lordship seeth whether you take the tenure of the tenancy, or the tenure of the manor'; this land must be held *in capite*, and therefore, &c.

THE
C A S E
O F
REVOCATION of USES,

In the KING's BENCH.

The case shortly put without names or dates more than of necessity is this.

SIR John Stanhope conveys the manor of Burrough-ash to his lady for part of her jointure, and intending (as is manifest) not to restrain himself, nor his son, from disposing some proportion of that land according to their occasions, so as my lady were at no loss by the exchange, insertheth into the conveyance a power of revocation and alteration in this manner ; provided that it shall be lawful for himself and his son successively to alter, and make void the uses, and to limit and appoint new uses, so it exceed not the value of 20*l.* to be computed after the rents then answered ; and that immediately after such declaration, or making void, the feoffees shall stand seised to such new uses. *Ita quod* he or his son, within six months after such declaration or making void, shall assure within the same towns, *tantum terrarum & tenementorum, & similis valoris*, as were so revoked to the uses expressed in the first conveyance.

SIR

THE CASE OF REVOCATION OF USES.

SIR John Stanhope his son revokes the land in Burrough-ash, and other parcels not exceeding the value of 20*l.* and within six months assures to my lady and to the former uses Burton-joice, and other lands; and the jury have found that the lands revoked contain twice so much in number of acres, and twice so much in yearly value, as the new lands; but yet that the new lands are rented at 21*l.* and find the lands of Burrough-ash, now out of lease formerly made: and that no notice of this new assurance was given before the ejectment, but only that Sir John Stanhope had by word told his mother that such an assurance was made, not shewing or delivering the deed.

THE question is whether Burrough-ash be well revoked; which question divides itself into three points.

FIRST, whether the *ita quod* be a void and idle clause? for if so, then there needs no new assurance, but the revocation is absolute *per se*.

THE next is, if it be an effectual clause, whether it be pursued or no? wherein the question will rest, whether the value of the reassured lands shall be only computed by rents?

AND the third is, if in other points it should be well pursued, yet whether the revocation can work until a sufficient notice of the new assurance?

AND I shall prove plainly, that *ita quod* stands well with the power of revocation; and if it should fall to the ground, it draws all the rest of the clause with it, and makes the whole void, and can't be void alone by itself.

I SHALL prove likewise that the value must needs be accounted not a tail value, or an arithmetical value by the rent, but a true value in quantity and quality.

AND lastly, that a notice is of necessity, as this case is.

I WILL not deny, but it is a great power of wit to make clear things doubtful ; but it is the true use of wit to make doubtful things clear, or at least to maintain things that are clear, to be clear, as they are. And in that kind I conceive my labour will be in this case, which I hold to be a case rather of novelty than difficulty, and therefore may require argument, but will not endure much argument : but to speak plainly to my understanding, as the case hath no equity in it (I might say piety) so it hath no great doubt in law.

FIRST therefore this it is, that I affirm, that the clause *so that, ita quod*, containing the recompence, governs the clause precedent of the power, and that it makes it wait and expect otherwise than as by way of inception ; but the effect and operation is suspended, till that part also be performed : and if otherwise, then I say plainly you shall not construe by fractions ; but the whole clause and power is void not *in tanto*, but *in toto*. Of the first of them I will give four reasons.

THE first reason is, that the wisdom of the law useth to transpose words according to the sense ; and not so much to respect how the words do take place, but how the acts, which are guided by those words, may take place.

HILL and Graunger's case comment. 171. A man in August makes a lease rendring 10 l. rent yearly to be paid at the feasts of Annunciation and Michaelmas : these words shall be inverted by law, as if they had been set thus, at Michaelmas and the Annunciation, for else he can't have a rent yearly ; for there will be fourteen months to the first year.

Hill and
Graunger's
case. Com. f.
17.

FITZ-WILLIAMS's case 2 Jac. Co. p. 6. f. 33. It was contained in an indenture of uses, that Sir William Fitz-Williams should have power to alter and change, revoke, determine, and make void the uses limited : the words are placed disorderly ;

Fitz-Williams's
case, 2 Jac. Co.
p. 6. f. 33.

orderly ; for it is in nature first to determine the uses, and after to change them by limitation of new. But the chief question being in the book, whether it might be done by the same deed ; it is admitted and thought not worth the speaking to, that the law shall marshal the acts against the order of the words, that is, first to make void, and then to limit.

So if I convey land, and covenant with you to make farther assurance, so that you require it of me, there though the request be placed last, yet it must be acted first.

So if I let land to you for a term, and say farther, it shall be lawful for you to take twenty timber-trees to erect a new tenement upon the land ; so that my bailiff do assign you where you shall take them, here the assignment, though last placed, must precede. And therefore the Grammarians do infer well upon the word (period,) which is a full and complete clause or sentence, that it is *complexus orationis circularis* : for as in a circle there is not *prius* nor *posteriorius*, so in one sentence you shall not respect the placing of words ; but though the words lie in length, yet the sense is round, so as *prima erunt novissima, & novissima prima*. For though you cannot speak all at once, so yet you must construe and judge upon all at once.

To apply this ; I say these words *so that*, though *loco & textu posteriora* ; yet they be *poteſtate & ſenſu priora* : as if they had been penned thus, that it shall be lawful for Sir Thomas Stanhope, so that he assure lands, &c. to revoke ; and what difference between, so that he assure, he may revoke, or he may revoke, so that he assure : for you must either make the *ſo that* to be precedent or void, as I shall tell you anon. And therefore the law will rather invert the words, than pervert the ſense,

But it will be said, that in the cases I put, it is left indefinite, when the act last limited shall be performed; and so the law may marshal it, as may stand with possibility; and so if it had been in this case no more but (*so that* Sir Thomas or John should assure new lands) and no time spoken of, the law might have intended it precedent. But in this case it is precisely put to be at any time within six months after the declaration, and therefore you cannot vary in the times.

To this I answer, that the new assurance must be in deed in time after the instrument or deed of the declaration; but on the other side it must be time precedent to the operation of the law, by determining the uses thereupon: so as it is not to be applied so much to the declaration itself, but to the warrant of the declaration. It shall be lawful, *so that, &c.* And this will appear more plainly by my second reason, to which now I come; for as for the cavillation upon the word immediately, I will speak to it after.

My second reason therefore is out of the use and signification of this conjunction or bond of speech, *so that*: for no man will make any great doubt of it, if the words had been *si*, if Sir Thomas shall within six months of such declaration convey; but that it must have been intended precedent; yet if you mark it well, these words *ita quod* and *si*, howsoever in propriety, the *ita quod* may seem subsequent, and the *si* precedent, yet they both bow to the sense.

So we see in 4 Edw. VI. Colthurft's case, a man leaseth to J. S. a house, *si ipse vellet habere, & residens esse*; there the word (*si*) amounts to a condition subsequent; for he could not be resident before he took the state; and so *via veritas* may *ita quod* be precedent, for else it must be void. But I go farther, for I say *ita quod*, though it be good words of condition, yet more properly

E. 6. Com.
Colthurft's
case.

Digg's case, 42
Eliz. Co. p.
f. 173.

properly it is neither condition precedent nor subsequent, but rather a qualification, or form, or adherent to the acts, whereto it is joined, and made part of their essence, which will appear evidently by other cases. For allow it had been thus, so that the deed of declaration be inrolled within six months, this is all one, as by deed inrolled within six months, as it is said in Digg's case 42 Eliz. f. 173. That by deed indented to be inrolled is all one with deed indented and inrolled. It is but a *modus faciendi*, a description, and of the same nature is the *ita quod*: so if it had been thus, it shall be lawful for Sir Thomas to declare, so that the declaration be with the consent of my lord chief justice, is it not all one with the more compendious form of penning, that Sir Thomas shall declare with the consent of my lord chief justice? And if it had been thus, so that Sir John within six months after such declaration shall obtain the consent of my lord chief justice, should not the uses have expected? but these you will say are forms, and circumstances annexed to the conveyance required; why surely any collateral matter coupled by the *ita quod* is as strong? If the *ita quod* had been that Sir John Stanhope within six months should have paid my lady 1000*l.* or entered into bond, never more to disturb her, or the like, all these make but one entire idea or notion how that his power should not be categorical, simple at pleasure, but hypothetical, and qualified, and restrained, that is to say, not the one without the other, and they are parts incorporated into the nature and essence of the authority itself.

THE third reason is the justice of the law taking words so, as no material part of the parties intent perish: for as one saith *præstat torque verba quam homines*, better wrest words out of place than my lady Stanhope out of her jointure that was meant to her. And therefore it is ei-

gantly said in *Fitz-Williams's case*, which I
touched before, though words be contradictory,
and (to use the phrase of the book) *pugnant tan-*
nam ex diametro; yet the law delighteth to make
atonement, as well between words, as between
parties, and will reconcile them, so as they may
stand, and abhorreth a *vacuum*, as well as nature
abhorreth it; and as nature to avoid a *vacuum*
will draw substances contrary to their propriety,
so will the law draw words. Therefore saith
Littleton, if I make a feoffment *reddendo* rent to
stranger, this is a condition to the feoffor, rather
than it shall be void, which is quite cross;
it sounds a rent, it works a condition, it is limited
to a third person, it inureth to the feoffor;
and yet the law favoureth not conditions, but to
void a *vacuum*.

So in the case of 45 E. III. a man gives land 45 E. 3.
in frank-marriage, the remainder in fee. The
frank-marriage is first put, and that can be but by
tenure of the donor; yet rather than the remain-
der should be void, though it be last placed, the
frank-marriage being but a privilege of estate
shall be destroyed.

So 33 H. 6. *Tressbam's case*: the King granteth
wardship, before it fall; good, because it can-
not inure by covenant, and if it should not be
good by plea, as the book terms it, it were void:
so that, no, not in the King's case, the law will
not admit words to be void.

So then the intent appears most plainly, that
this act of Sir John should be *actus geminus*, a
kind of twine to take back, and to give back,
and to make an exchange, and not a resumption;
and therefore upon a conceit of repugnancy, to
take the one part, which is the privation of my
lady's jointure, and not the other, which is the
restitution or compensation, were a thing utter-
injurious in matter, and absurd in construction.

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THE fourth reason is out of the nature of the conveyance, which is by way of use, and therefore ought to be construed more favourably according to the intent, and not literally or strictly: for although it be said in *Frene* and *Dillon's* case, and in *Fitz-Williams's* case, that it is safe so to construe the statute of 27 H. VIII. as that uses may be made subject to the rules of the common law, which the professors of the law do know, and not leave them to be extravagant and irregular; yet if the late authorities be well marked, and the reason of them, you shall find this difference, that uses in point of operation are reduced to a kind of conformity with the rule of the common law, but that in point of exposition of words, they retain somewhat of their ancient nature, and are expounded more liberally according to the intent; for with that part the statute of 27. doth not meddle. And therefore is the question be, whether a bargain and sale upon condition be good to reduce the state back without an entry; or whether, if a man make a feoffment in fee to the use of *John a Style* for years, the remainder to the right heirs of *John a Downe*, this remainder be good or no; these cases will follow the grounds of the common law for possessions, in point of operation; but so will it not be in point of exposition.

For if I have the manor of *Dale*, and the manor of *Sale* lying both in *Vale*, and I make a lease for life of them both, the remainder of the manor of *Dale*, and all other my lands in *Vale* to *John a Style*, the remainder of the manor of *Sale* to *John a Downe*, this latter remainder void, because it comes too late, the general words having carried it before to *John a Style*. But put it by way of use; a man makes a feoffment in fee of both manors, and limits the use of the manor of *Dale*, and all other the lands in *Vale*, to the use of himself, and his wife for her jointure.

jointure, and of the manor of *Sale*, to the use of himself alone. Now his wife shall have no jointure in the manor of *Sale*; and so was it judged in the case of the manor of *Odiam*.

The case of
the manor of
Odiam.

AND therefore our case is more strong, being by way of use, and you may well construe the latter part to controul and qualify the first, and to make it attend and expect; nay, it is not amiss to see the case of *Peryman* 41 Eliz. Coke p. 5. f. 41 Eliz. Co.
84. where by a custom a livery may expect; for p. 5. f. 84.
the case was, that in the manor of *Porchester*, the custom was, that a feoffment of land should not be good, except it were presented within a year in the court of the manor, and there ruled that it was but *actus inchoatus*, till it was presented; now if it be not merely against reason of law, that so solemn a conveyance as livery, which keeps state, (I tell you) and will not wait, should expect a farther perfection, *a fortiori* may a conveyance in use, or declaration of use receive a consummation by degrees, and several acts. And thus much for the main point.

Now for the objection of the word (immediate,) it is but light, and a kind of sophistry. They say that the words are, that the uses shall rise immediately after the declaration, and we would have an interposition of an act between, viz. that there should be a declaration first, then a new assurance within the six months; and lastly, the uses to rise; whereunto the answer is easy; for we have shewed before, that the declaration and the new assurance are in the intent of him that made the conveyance, and likewise in eye of law, but as one compounded act. So as *immediately after the declaration* must be understood of a perfect and effectual declaration, with the adjuncts and accouplements expressed.

So we see in 49 E. III. f. 11. If a man be at- 49 E. 3. f. 11.
tainted of felony, that holds lands of a common person, the King shall have his year, day and

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waste : but when ? not before an office found : and yet the words of the statute of *prærogativa Regis* are, *Rex habebit catalla felonum, & si ipsi habent liberum tenementum, statim capiatur in manus domini, & rex habebit annum, diem, & vacuum* : and here the word *statim* is understood of the effectual and lawful time, that is after office found.

2 H. 4. f. 17.

So in 2 H. IV. f. 17. it appears that by the statute of *Alton Burnell*, if the debt be acknowledged, and the day past, that the goods of the debtors shall be sold *statim*, in *French, maintenant*; yet nevertheless, this *statim* shall not be understood, not before the process of law requisite passed, that is, the day comprised in the extent.

27 H. 8. f. 19.

So it is said 27 H. VIII. f. 19. by *Audley* the chancellor, that the present tense shall be taken for the future, *a fortiori* say I the immediate future tense may be taken for a distant future tense: as if I be bound that my son being of the age of twenty-one years shall marry your daughter, and that he be now of twelve years ; yet this shall be understood, when he shall be of the age of twenty-one years. And so in our case *immediately after the declaration* is intended, when all things shall be performed, that are coupled with the said declaration.

BUT in this I doubt I labour too much ; for no man will be of opinion, that it was intended that the lady *Stanhope* should be six whole months without either the old jointure or the new ; but that the old should expect until the new were settled without any *interim*. And so I conclude this course of atonements (as *Fitz-Williams's case* calls it) whereby I have proved, that all the words by a true marshalling of the acts may stand according to the intent of the parties.

I MAY add *tanquam ex abundanti*, that if both clauses do not live together, they must both die together ;

together ; for the law loves neither fractions of estates, nor fractions of constructions : and therefore in *Jermin and Askew's case*, 37 Eliz. a man did devise lands in tail with proviso, that if the devisee did attempt to alien, his estate should cease, as if he were naturally dead. Is it said there, that the words, as if he were naturally dead, shall be void, and the words that his estate shall cease ? good : No, but the whole shall be void. And it is all one reason of a *so that*, as of an *as if*, for they both suspend the sentence.

So if I make a lease for life, upon condition he shall not alien, nor take the profits, shall this be good for the first part, and void for the second ? No, but it shall be void for both.

So if the power of declaration of uses had been thus penn'd, that Sir John Stanhope might by his deed indented declare new uses, so that the deed were inrolled before the mayor of St. Albans, who hath no power to take inrollments ; or so that the deed were made in such sort, as might not be made void by parliament : in all these and the like cases the impossibility of the last part doth strike upwards and infect, and destroy the whole clause. And therefore, that all the words may stand, is the first and true course ; that all the words be void is the second and probable ; but that the revoking part should be good, and the assuring part void, hath neither truth nor probability.

Now come I to the second point, how this value should be measured, wherein methinks you are as ill a measurer of values, as you are an expounder of words ; which point I will divide, first considering what the law doth generally intend by the word *value* ; and secondly to see what special words may be in these clauses, either to draw it to a value of a present arrengement, or to understand it of a just and true value.

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THE word *value* is a word well known to the law, and therefore cannot be (except it be willingly misunderstood.) By the common law there is upon a warrant a recovery in value. I put the case therefore that I make a feoffment in fee with warranty of the manor of *Dale*, being worth 20*l.* *per annum*, and then in lease for 20*s.* The lease expires; (for that is our case, though I hold it not needful) the question is, whether upon an eviction there shall not be recovered from me land to the value of 20*l.*

So if a man give land in frank-marriage then rented at 40*l.* and no more worth; there descendeth other lands, let perhaps for a year or two for 20*l.* but worth 80*l.* shall not the donee be at liberty to put this land in hotchpot.

So if two partners be in tail, and they make partition of lands equal in rent, but far unequal in value, shall this bind their issues? By no means; for there is no kalendar so false to judge of values, as the rent, being sometimes improved, sometimes ancient, sometimes where great fines have been taken, sometimes where no fines; so as in point of recompence you were as good put false weights into the hands of the law, as to bring in this interpretation of value by a present arrentation. But this is not worth the speaking to in general; that which giveth colour, is the special words in the clause of revocation, that the 20*l.* value should be according to the rents then answered; and therefore that there should be a correspondence in the computation likewise of the recompence. But this is so far from countenancing that exposition, as, well noted, it crosseth it; for *opposita juxta se posita magis elucentur*: first, it may be the intent of Sir Thomas in the first clause was double, partly to exclude any land in demesne, partly knowing the land was double, and as some say quadruple better than the rent, he would

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would have the more scope of revocation under his 20*l.* value.

BUT what is this to the clause of recompence? first, are there any words *secundum computationem predictam?* There are none. Secondly, doth the clause rest upon the words *similis valoris?* No, but joineth *tantum & similis valoris:* confound not predicaments; for they are the mere-stones of reason. Here is both quantity and quality; nay he faith farther within the same towns. Why? marry it is somewhat to have men's possessions lie about them, and not dispersed. So it must be as much, as good, as near; so plainly doth the intent appear, that my lady should not be a loser.

FOR the point of the notice it was discharged by the court.

Q 3

T H E

THE
 JURISDICTION
 OF THE
 MARCHES.

The effect of the first argument of the King's sollicitor-general, in maintaining the jurisdiction of the council of the marches over the four shires.

THE question for the present is only upon the statute of 34 H. VIII. and though it be a great question, yet it is contracted into small room; for it is but a true construction of a monosyllable, the word *marches*.

THE exposition of all words resteth upon three proofs, the propriety of the word, and matter precedent and subsequent.

MATTER precedent concerning the intent of those that speak the words, and matter subsequent touching the conceit, and understanding of those that construe and receive them.

FIRST therefore as to *vis termini*, the force and propriety of the word; this word (*marches*) signifieth no more but limits, or confines, or borders, in latin *limites*, or *confinia*, or *contermina*; and thereof was derived at the first *marchio*, a marquess, which was *comes limitaneus*.

Now these limits cannot be *linea imaginaria*, but it must have some contents and dimensions, and that can be no other but the counties adjacent:

cent: and for this construction we need not wander out of our own state, for we see the counties of *Northumberland*, *Cumberland*, and *Westmoreland*, lately the borders upon *Scotland*. Now the middle shires were commonly called the east, west, and middle marches.

To proceed therefore to the intention of those, that made the statute in the use of this word; I shall prove that the parliament took it in this sense by three several arguments.

THE first is, that otherwise the word should be idle; and it is a rule, *verba sunt accipienda, ut fortiantur effectum*: for this word (marches) as is confessed on the other side, must be either for the counties marches, which is our sense, or the lordships marchers, which is theirs; that is, such lordships, as by reason of the incursions and infestations of the *Welch* in ancient time, were not under the constant possession of either dominion, but like the batable ground where the war played. Now if this latter sense be destroyed, then all equivocation ceaseth.

THAT it is destroyed, appears manifestly by the statute of 27 H. VIII. made seven years before the statute, of which we dispute; for by that statute all the lordships marchers are made shire-ground, being either annexed to the ancient counties of *Wales*, or to the ancient counties of *England*, or erected into new counties, and made parcel of the dominion of *Wales*, and so no more marches after the statute of 27. So as there were no marches in that sense at the time of making of the statute of 34.

THE second argument is from the comparing of the place of the statute, whereupon our doubt riseth, (*viz.*) that there shall be and remain a lord president and council in the dominion of *Wales*, and the marches of the same, &c. with another place of the same statute, where the word (marches) is left out; for the rule is, *opposita juxta se posita*

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posita magis elucent. There is a clause in the statute, which gives power and authority to the King to make and alter laws for the weal of his subjects of his dominion of *Wales*, there the word (marches) is omitted; because it was not thought reasonable to invest the King with a power to alter the laws, which is the subjects birth-right in any part of the realm of *England*; and therefore by the omission of the word (marches) in that place you may manifestly collect the signification of the word in the other, that is, to be meant of the four counties of *England*.

THE third argument which we will use is this; the council of the marches was not erected by the act of parliament, but confirmed; for there was a president and council long before in *E. IV.* his time, by matter yet appearing; and it is evident upon the statute itself, that in the very clause which we now handle, it referreth twice to the usage, as heretofore hath been used.

THIS then I infer, that whatsoever was the King's intention in the first erection of this court, was likewise the intention of the parliament in the establishing thereof, because the parliament builded but upon an old foundation.

THE King's intention appeareth to have had three branches, whereof every of them doth manifestly comprehend the four shires.

THE first was the better to bridle the subject of *Wales*, which at that time was not reclaimed; and therefore it was necessary for the president and council there to have jurisdiction and command over the *English* shires; because that by the aid of them, which were undoubted good subjects, they might the better govern and suppress those that were doubtful subjects.

AND if it be said that it is true, that the four shires were comprehended in the commission of *oyer and terminer*, for the suppressing of riots and misdemeanors, but not for the jurisdiction of a

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court of equity; to that I answer, that there commission of *oyer and terminer* was but *gladius in vagina*, for it was not put in practice amongst them; for even in punishment of riots and misdemeanors, they proceeded not by their commission of *oyer and terminer* by way of jury, but as a council by way of examination. And again it was necessary to strengthen that court for their better countenance with both *jurisdictions*, as well civil and criminal, for *gladius gladium juvat*.

THE second branch of the King's intention was to make a better equality of commerce, and intercourse in contracts and dealings between the subjects of *Wales* and the subjects of *England*; and this of necessity must comprehend the four shires: for otherwise, if the subject of *England* had been wronged by the *Welch* on the sides of *Wales*, he might take his remedy nearer hand. But if the subject of *Wales*, for whose weal and benefit the statute was chiefly made, had been wronged by the *English* in any of the shires, he might have sought his remedy at *Westminster*.

THE third branch of the King's intent was to make a convenient dignity and state for the manion and resiance of his eldest son, when he should be created Prince of *Wales*, which likewise must plainly include the four shires: for otherwise to have sent *primogenitum Regis* to a government, which without the mixture of the four shires (as things then were) had more peril than honour or command; or to have granted him only a power of lieutenancy in those shires, where he was to keep his state, not adorn'd with some authority civil, had not been convenient.

So that here I conclude the second part of that am to say touching the intention of the parliament precedent.

Now touching the construction subsequent, the sole is good, *optimus legum interpres consuetudo*; for our labour is not to maintain an usage against a sta-

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a statute, but by an usage to expound a statute; for no man will say, but the word (marches) will bear the sense, that we give it.

THIS usage or custom is fortified by four notable circumstances; first that it is ancient and not late, or recent; secondly, it is authorized and not popular, or vulgar; thirdly, that it hath been admitted and quiet, and not litigious or interrupted; and fourthly, when it was brought in question, which was but once, it hath been affirmed *judicio controverso*.

FOR the first, there is record of a president and council, that hath exercised and practised jurisdiction in these shires, as well sixty years before the statute, *viz.* since 18 E. IV. as the like number of years since: so that it is *janus bifrons*, it hath a face backwards from the statute, as well as forwards.

FOR the second, it hath received these allowances by the practice of that court, by suits originally commenced there by remanding from the courts of *Westminster*, when causes within those shires have been commenced here above; sometimes in chancery, sometimes in the star-chamber, by the admittance of diverse great learned men, and great judges, that have been of that council, and exercised that jurisdiction; as at one time *Bromley*, *Morgan*, and *Brook*, being the two chief justices, and chief baron, and diverse others, by the King's learned council, which always were called to the penning of the King's instructions; and lastly, by the King's instructions themselves, which though they be not always extant, yet it is manifest that since 17 H. VIII. when Princess *Mary* went down, that the four shires were ever comprehended in the instructions, either by name, or by that, that amounts to so much. So as it appears that this usage or practice hath not been an obscure custom practised by the multitude, which is many times erroneous, but authorized

ized by the judgment and consent of the state : for as it is *vera vox* to say, *maximus erroris populis magister*; so it is *dura vox* to say, *maximus erroris princeps magister*.

FOR the third, it was never brought in question till 16 Eliz. in the case of one *Winde*.

AND for the fourth, the controversy being moved in that case, it was referred to *Gerrard* attorney, and *Bromley* solicitor, which was afterwards chancellor of *England*, and had his whole state of living in *Shropshire* and *Worcester*, and by them reported to the lords of the council in the star-chamber, and upon their report decreed, and the jurisdiction affirmed.

LASTLY, I will conclude with two manifest badges and tokens, though but external, yet violent in demonstration, that these four shires were understood by the word *marches*; the one the denomination of that council, which was ever in common appellation termed and styled *the council of the marches, or in the marches*, rather than the council of *Wales*, or in *Wales*, and *denominatio est a digniore*. If it had been intended lordships marchers, it had been, as if one should have called my lord mayor, my lord mayor of the suburbs. But it was plainly intended of the four English shires, which indeed were the more worthy.

AND the other is of the perpetual residence and mansion of the council, which was evermore in the shires, and to imagine that a court should not have jurisdiction, where it sitteth, is a thing utterly improbable, for they should be *tanquam pisces in arido*.

So as upon the whole matter, I conclude that the word (marches) in that place by the natural sense, and true intent of the statute, is meant of the four shires.

The effect of that, that was spoken by Serjeant Hutton and Serjeant Harris, in answer of the former argument, and for the excluding of the jurisdiction of the marches in the four shires.

THAT, which they both did deliver, was reduced to three heads.

THE first, to prove the use of the word (marches) for lordships marchers.

THE second to prove the continuance of that use of the word, after the statute of 27. that made the lordships marchers shire-grounds; whereupon it was inferred, that though the marches were destroyed in nature, yet they remained in name.

THE third was some collections, they made upon the statute of 34. whereby they inferred that that statute intended that word in that signification.

FOR the first, they did allege diverse statutes before 27 H. VIII. and diverse book-cases of law in print, and diverse offices and records, wherein the word (marches) of Wales was understood of the lordships marchers.

THEY said farther, and concluded, that whereas we shew our sense of the word but rare, they shew theirs common and frequent; and whereas we shew it but in a vulgar use and acceptation, they shew theirs in a legal use in statutes, authorities of books, and ancient records.

THEY said farther, that the example we brought of marches upon Scotland, was not like, but rather contrary; for they were never call'd marches of Scotland, but the marches of England: whereas

whereas the statute of 34. doth not speak of the marches of *England*, but of the marches of *Wales*.

THEY said farther, that the county of Worcester did in no place or point touch upon *Wales*, and therefore that county could not be termed marches.

To the second they produced three proofs; first, some words in the statute of 32 H. VIII. where the statute providing for a form of trial for reason committed in *Wales*, and the marches thereof, doth use that word, which was in time after the statute of 27. whereby they prove the use of the word continued.

THE second proof was out of two places of the statute, whereupon we dispute, where the word *marches* is used for the lordships marchers.

THE third proof was the style and form of the commission of *oyer* and *terminer* even to this day, which run to give power and authority to the resident and council there, *infra principalitat. Wallie*, and *infra* the four counties by name, with his clause farther, *& marchias Walliae eisdem co-
nitibus adjacent*: whereby they infer two things strongly, the one that the marches of *Wales* must needs be a distinct thing from the four counties; the other that the word (*marches*) was used for the lordships marchers long after both statutes.

THEY said farther, that otherwise the proceeding, which had been in the four new erected counties of *Wales* by the commission of *oyer* and *terminer*, by force whereof many had been proceeded with both for life, and otherways, should be called in question, as *coram non judice*, insomuch as they neither were part of the Principality of *Wales*, nor part of the four shires; and therefore must be contained by the word (*marches*) not at all.

For the third head, they did insist upon the statute of 34. and upon the preamble of the same statute.

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THE title being an act for certain ordinances in the King's Majesty's dominion and principality of *Wales*: and the preamble being for the tender zeal and affection that the King bears to his subjects of *Wales*. And again, at the humble suit and petition of his subjects of *Wales*: whereby they infer that the statute had no purpose to extend or intermeddle with any part of the King's dominions or subjects, but only within *Wales*.

AND for usage and practice they said, it was nothing against an act of parliament.

AND for the instructions, they pressed to see the instructions immediately after the statute made.

AND for the certificate and opinions of *Gerrard* and *Bromley*, they said they doubted not but that if it were now referred to the attorney and solicitor, they would certify as they did.

AND lastly, they relied, as upon their principal strength, upon the president of that, which was done of the exempting of *Cheshire* from the late jurisdiction of the said council; for they said, that from 34 of *H. VIII.* until 2 of Queen *Eliz.* the court of the marches did usurp jurisdiction upon that county, being likewise adjacent to *Wales*, as the other four are; but that in the eleventh year of Queen *Elizabeth* aforesaid, the same being questioned at the suit of one *Radford*, was referred to the Lord *Dyer*, and three other judges, who by their certificate, at large remaining of record in the chancery, did pronounce the said shire to be exempted, and that in the conclusion of their certificate they give this reason, because it was no part of the principality, or the marches of *Wales*. By which reason they say, it should appear, their opinion was, that the word *marches* could not extend to counties adjacent. This was the substance of their defence.

The reply of the King's follicitor to
the arguments of the two serjeants.

HAVING divided the substance of their arguments (*ut supra*) he did pursue the same division in his reply, observing nevertheless both great redundancy, and a great defect in that, which was spoken. For touching the use of the word (*marches*) great labour had been taken, which was not denied: but touching the intent of the parliament, and the reasons to demonstrate the same, which were the life of the question, nothing or nothing had been spoken.

AND therefore as to the first head, that the word *marches* had been often applied to the lordships marchers, he said it was the sophism, which called *sciomachia*, fighting with their shadows, and that the sound of so many statutes, so many printed book-caſes, so many records were *nominatae magna*, but they did not press the question; for they grant that the word *marches* hath significations, sometimes for the counties, sometimes for the lordships marchers, like as *Northampton*, and *Warwick* is sometimes taken for the towns of *Northampton* and *Warwick*, and sometimes for the remaining counties of *Northampton* and *Warwick*. And *Dale* and *Sale* are sometimes taken for the villages or hamlets of *Dale* and *Sale*, and sometimes taken for the parishes of *Dale* and *Sale*: and therefore that the most part of that they had said, went not to the point.

To that answer, which was given to the example of the middle shires upon *Scotland*, it was said, it was not *ad idem*; for we used it to prove that the word *marches* may and doth refer to whole counties; and so much it doth Manifestly prove; neither can they deny it. But then they

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pinch upon the addition, because the English counties adjacent upon Scotland are called the marches of *England*, and the English counties adjacent upon *Wales* are called the marches of *Wales*; which is but a difference in phrase: for sometimes limits and borders have their names of the inward country, and sometimes of the outward country; for the distinction of *exclusive* and *inclusive* is a distinction both in time and place; as we see that that, which we call this day fortnight, excluding the day, the *French* and the law-phrase calls this day fifteen days, or *quindena* including the day. And if they had been called the marches upon *Wales*, or the marches against *Wales*, then it had been clear and plain; and what difference between the banks of the sea, and the banks against the sea? So that he took this to be but a toy, or cavillation, for that phrases of speech are *ad placitum, & recipiunt casum.*

As to the reason of the map, that the county of *Worcester* doth no way touch upon *Wales*, it is true, and I do find when the lordships marchers were annexed, some were laid to every other of the three shires, but none to *Worcester*. And no doubt but this emboldened *Wynd* to make the claim to *Worcester*, which he durst not have thought on for any of the other three. But it falls out well that that, which is the weakest probability, is strongest in proof; for there is a case ruled in that more than in the rest. But the true reason is, that usage must over-rule propriety of speech; and therefore if all commissions, and instructions, and practices, have coupled these four shires, it is not the map that will sever them.

To the second head he gave this answer. First, he observed in general that they had not shewed one statute, or one book-case, or one record (the commissions of *oyer* and *terminer* only excepted) wherein the word (*marches*) was used for

lordships marchers since the statute of 34. So that it is evident, that as they granted the nature of those marches was destroyed and extinct by 27; so the name was discontinued soon after, and did but remain a very small while, like the sound of a bell, after it hath been rung, and as indeed it is usual when names are altered, that the old name, which is expired, will continue for a small time.

SECONDLY, he said, that whereas they had made the comparison, that our acceptation of the word was popular, and theirs was legal, because it was extant in book-cases, and statutes, and records, they must needs confess that they are beaten from that hold: for the name ceased to be legal clearly by the law of 27. which made the alteration in the thing itself, whereof the name is but a shadow; and if the name did remain afterwards, then it was neither legal, nor so much as vulgar, but it was only by abuse, and by a trope or *catachresis*.

THIRDLY, he shewed the impossibility how that signification should continue, and be intended by the statute of 34. For if it did, it must be in one of these two senses, either that it was meant to have of the lordships marchers made part of *Wales*, But if of the lordships marchers annexed to the four least in shires of *England*.

For the first of these, it is plainly impugned by the statute itself: for the first clause of the statute doth set forth that the principality and dominion of *Wales* shall consist of twelve shires; wherein the four new erected counties, which were formerly lordships marchers, and whatsoever else was lordships marchers annexed to the ancient

First counties of *Wales* is comprehended; so that of shew necessity all that territory or border must be *Wales*: record open followeth the clause immediately, whereupon only esce now differ, (*viz.*) that there shall be and re- fised for main a president and council in the principality of lordships

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Wales, and the marches of the same ; so that the parliament could not forget so soon what they had said in the clause next before : and therefore by the marches they meant somewhat else besides that which was *Wales*. Then, if they fly to the second signification, and say that it was meant by the lordships marchers annexed to the four *English* shires, that device is merely *nuper nata oratio*, a mere fiction and invention of wit, crossed by the whole stream and current of practice ; for if that were so, the jurisdiction of the council should be over part of those shires, and in part not ; and then in the suits commenced against any of the inhabitants of the four shires, it ought to have been laid or shew'd that they dwelt within the ancient lordships marchers, whereof there is no shadow that can be shewed.

THEN he proceeded to the three particulars. And for the statute of 32. for trial of treason, he said it was necessary that the word (*marches*) should be added to *Wales*, for which he gave this reason, that the statute did not only extend to the trial of treasons, which should be committed after the statute, but did also look back to treasons committed before : and therefore this statute being made but five years after the statute of 27. that extinguished the lordships marchers, and looking back, as was said, was fit to be penn'd with words, that might include the preter-perfect tense, as well as the present tense ; for if it had rested only upon the word *Wales*, then a treason committed before the lordships marchers were made part of *Wales*, might have escaped the law.

To this also another answer was given, which was, that the word *marches* as used in that statute ; it could not be referred to the four shires, because of the words following, wherewith it is coupled, (*viz.*) in *Wales*, and the marches of the same, where the King's writ runs not.

To the two places of the statute of 34. itself, wherein the word (*marches*) is used for lordships marchers; if they be diligently marked, it is merely sophistry to allege them; for both of them do speak by way of recital of the time past before the statute of 27. as the words themselves being read over will shew without any other enforcement; so that this is still to use the almanack of the old year with the new.

To the commissions of *oyer and terminer*, which seemeth to be the best evidence they shew for the continuance of the name in that *tropical* or abused sense, it might move somewhat, if this form of penning those commissions had been begun since the statute of 27. But we shew forth the commission in 17 H. VIII. when the princess Mary went down, running in the same manner *verbatim*, and in that time it was proper, and could not otherwise be. So that it appeareth that it was but merely a *fac simile*, and that notwithstanding the case was altered, yet the clerk of the crown pursued the former president; hurt it did none, for the word (*marches*) is there superfluous.

AND whereas it was said, that the words in those commissions were effectual, because else the proceeding in the four new erected shires of *Wales* should be *coram non judice*, that objection carrieth no colour at all; for it is plain, they have authority by the word *Principality of Wales* without adding the word *marches*; and that is proved by a number of places in the statute of 34. where if the word *Wales* should not comprehend those shires, they should be excluded in effect of the whole benefit of that statute; for the word (*marches*) is never added in any of these places.

To the third head, touching the true intent of the statute, he first noted how naked their proof was in that kind, which was the life of the que-

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stion, for all the rest was but *in litera, & in cortice.*

HE observed also that all the strength of our proof, that concerned that point, they had passed over in silence, as belike not able to answer ; for they had said nothing to the first intentions of the erections of the court, whereupon the parliament built nothing to the diversity of penning, which was observed in the statute of 34. leaving out the word *marches*, and resting upon the word *Wales* alone, nothing to the resiance, nothing to the denomination, nothing to the continual practice before the statute and after, nothing to the King's instructions, &c.

As for that, that they gather out of the title and preamble, that the statute was made for *Wales*, and for the weal and government of *Wales*, and at the petition of the subjects of *Wales*, it was little to the purpose ; for no man will affirm on our part the four *English* shires were brought under the jurisdiction of that council, either first by the King, or after by the parliament for their own sakes, being in parts no farther remote ; but it was for congruities sake, and for the good of *Wales*, that that commixture was requisite : and *turpis est pars, quæ non congruit cum toto.* And therefore there was no reason, that the statute should be made at their petition, considering they were not *primi in intentione*, but came *ex consequenti.*

AND whereas they say that usage is nothing against an act of parliament, it seems they do voluntarily mistake, when they cannot answer, for we do not bring usage to cross an act of parliament, where it is clear, but to expound an act of parliament, where it is doubtful : and evermore *contemporanea interpretatio*, whether it be of statute or Scripture, or author whatsoever, is of greatest credit ; for to come now above sixty years after by subtily of wit to expound a statute otherwise than the ages immediately succeeding

ing did conceive it, is *expositio contentiosa*, and not *naturalis*. And whereas they extenuate the opinion of the attorney and sollicitor, it is not so easy to do; for first they were famous men, and one of them had his patrimony in the shires; secondly, it was of such weight, as a decree of the council was grounded upon it; and thirdly, it was not unlike, but that they had conferred with the judges, as the attorney and sollicitor do often use in like cases.

LASTLY, for the exemption of *Cheshire* he gave this answer. First, that the certificate in the whole body of it, till within three or four of the last lines, doth rely wholly upon that reason, because it was a county *Palatine*, and to speak truth, it stood not with any great sense or proportion, that that place, which was privileged and exempted from the jurisdiction of the courts of *Westminster*, should be meant by the parliament to be subjected to the jurisdiction of that council.

SECONDLY, he said that those reasons, which we do much insist upon for the four shires, hold not for *Cheshire*; for we say it is fit the subject of *Vales* be not forced to sue at *Westminster*, but have his justice near hand; so may he have in *Cheshire*, because there is both a justice for common law and a chancery; we say it is convenient for the prince, if it please the King, to send him down, to have some jurisdiction civil as well as for the peace; so may he have in *Cheshire*, as earl *Chester*. And therefore those grave men had great reason to conceive that the parliament did not intend to include *Cheshire*.

AND whereas they pinch upon the last words of the certificate, viz. that *Cheshire* was no part of the dominion, nor of the marches, they must apply it with this sense, not within the meaning of the statute; for otherwise the judges could have discerned of it; for they were not to look to the fact, but to expound the statute; and that

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they did upon those reasons, which were special to *Cheshire*, and have no affinity with the four shires.

AND therefore if it be well weighed, that certificate makes against them; for as *exceptio firmat legem in casibus non exceptis*; so the excepting of that shire by itself doth fortify, that the rest of the shires were included in the very point of difference.

AFTER this he shewed a statute in 18 *Eliz.* by which provision is made for the repair of a bridge called *Chepstow-Bridge* between *Monmouth* and *Glocester*, and the charge lay in part upon *Glocestershire*; in which statute there is a clause, that if the justices of peace do not their duty in levying of the money, they shall forfeit five pounds, to be recovered by information before the council of the marches; whereby he inferred that the parliament would never have assigned the suit to that court, but that it conceived *Glocestershire* to be within the jurisdiction thereof. And therefore he concluded that here is in the nature of a judgment by parliament, that the shires are within the jurisdiction.

The third and last argument of the King's sollicitor in the case of the marches, in reply to serjeant Harris.

THIS case groweth now to some ripeness, and I am glad we have put the other side into the right way; for in former arguments they laboured little upon the intent of the statute of 34 *H. VIII.* and busied themselves in effect altogether about the force and use of the word (*marches*); but now finding that *litera mortua non proficit*, they offer at the true state of the question, which is the intent; I am determined therefore

to reply to them in their own order, *ut manifestum sit* (as he saith) *me nihil aut subterfugere voluisse reticendo, aut obscurare dicendo.*

ALL which hath been spoken on their part, consisteth upon three proofs.

THE first was by certain inferences to prove the intent of the statute.

THE second was to prove the use of the word (*marches,*) in their sense long after both statutes; both that of 27. which extinguished the lordships marchers, and that of 34. whereupon our question ariseth.

THE third was to prove an interruption of that practice and use of jurisdiction, upon which we mainly insist, as the best exposition of the statute.

For the first of these, concerning the intention, they brought five reasons.

THE first was, that this statute of 34. was grounded upon a platform, or preparative of certain ordinances made by the King two years before, *viz.* 32. In which ordinances there is the very clause, whereupon we dispute, *viz.* That there should be and remain in the dominion and principality of *Wales* a president and a council: In which clause nevertheless the word (*marches*) is left out, whereby they collect that it came into the statute of 34. but as a slip without any farther reach or meaning.

THE second was that the mischief before the statute, which the statute means to remedy, was, that *Wales* was not governed according to similitude or conformity with the laws of *England*. And therefore, that it was a cross and perverse construction, when the statute laboured to draw *Wales* to the laws of *England*, to construe it that it should abridge the ancient subjects of *England* of their own laws.

THE third was, that in a case of so great importance, it is like that if the statute had meant

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to include the four shires, it would have carried it in a dark general word, as it were *nostanter*, but would have named the shires to be comprehended.

THE fourth was the more to fortify the third reason, they observed that the four shires are remembred and named in several places of the statute, three in number; and therefore it is not like that they would have been forgotten in the principal place, if they had been meant.

THE fifth and last was, that there is no clause of attendance; that the sheriffs of the four shires should attend the lord president and the council, wherein there was urged the example of the acts of parliament, which erected courts; as the court of Augmentations, the court of Wards, the court of Survey, in all which there are clauses of attendance; whereupon they inferred that evermore, where a statute gives a court jurisdiction, it strengtheneth it with a clause of attendance; and therefore no such clause being in this statute, it was like there was no jurisdiction meant. Nay, farther they noted, that in this very statute for the justices of *Wales*, there is a clause of attendance from the sheriffs of *Wales*.

IN answer to their first reason, they do very well, in my opinion, to consider Mr. attorney's business and mine, and therefore to find out for us evidence and proofs, which we have no time to search; for certainly nothing can make more for us than these ordinances, which they produce for the diversity of penning of that clause in the ordinances, where the word (*marches*) is omitted, and that clause in the statute, where the word *marches* is added, is a clear and perfect direction what was meant by that word. The ordinances were made by force, and in pursuance of authority given to the King by the statute of 27. to what did the statute extend, only to *Wales*? And therefore the word *marches* in the ordinances is

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left out; but the statute of 34. respected not only *Wales*, but the commixed government, and therefore the word *marches* was put in. They might have remembred that we built an argument upon the difference of penning of that statute of 34. itself in the several clauses of the same; for that in all other clauses, which concern only *Wales*, the word *marches* is ever omitted; and in that clause alone, that concerneth the jurisdiction of the president and council, it is inserted. And this our argument is notably fortified by that they now shew of the ordinances, wherein the very self same clause, touching the president and council, because the King had no authority to meddle but with *Wales*, the word *marches* is omitted. So that it is most plain that this word comes not in by chance or slip, but with judgment and purpose, as an effectual word; for as it was formerly said, *opposita juxta se posita magis elucescunt*; and therefore I may likewise urge another place in the statute which is left out in the ordinance; for I find there is a clause that the town of *Bendley*, which is confessed to be no lordship's marcher, but to lie within the county of *Worcester*; yet because it was an exempted jurisdiction, is by the statute annexed unto the body of the said country. First, this shews that the statute of 34. is not confined to *Wales*, and the lordships marchers, but that it intermeddles with *Worcestershire*. Next do you find any such clause in the ordinance of 32? No: Why? Because they were appropriate to *Wales*. So that in my opinion nothing could enforce our exposition better than the collating of the ordinance of 32. with the statute of 34.

In answer to the second reason, the course, that I see often taken in this cause, makes me think of the phrase of the Psalm, *starting aside like a broken bow*; so when they find their reasons broken, they start aside to things not in question. For now they speak, as if we went about to make

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make the four shires *Wales*, or to take from them the benefit of the laws of *England*, or their being accounted amongst the ancient counties of *England*: doth any man say that those shires are not within the circuits of *England*, but subject to the justices of *Wales*? Or that they should send but one knight to the parliament, as the shires of *Wales* do? Or that they may not sue at *Westminster*, in chancery, or at common law, or the like? No man affirms any such things; we take nothing from them, only we give them a court of summary justice in certain causes at their own doors.

AND this is *nova doctrina* to make such an opposition between law and equity, and between formal justice and summary justice. For there is no law under heaven, which is not supplied with equity; for *summum jus, summa injuria*, or as some have it, *summa lex, summa crux*. And therefore all nations have equity; but some have law and equity mixed in the same court, which is the worse; and some have it distinguished in several courts, which is the better. Look into any counties *Palatine*, which are small models of the great government of kingdoms, and you shall never find any, but had a chancery.

LASTLY, it is strange that all other places do require courts of summary justice, and esteem them to be privileges and graces; and in this cause only they are thought to be servitudes and loss of birth-right. The universities have a court of summary justice, and yet I never heard that scholars complain their birth-right was taken from them. The stannaries have them, and you have lately affirmed the jurisdiction; and yet you have taken away no man's birth-right. The court at *York*, whosoever looks into it, was erected at the petition of the people, and yet the people did not mean to cast away their birth-right. The court of wards is mixed with discretion and equity;

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and yet I never heard that infants and innocents were deprived of their birth-right. *London*, which is the seat of the kingdom, hath a court of equity, and holdeth it for a grace and favour; how then cometh this case to be singular? And therefore these be new phrases and conceits proceeding of error or worse; and it makes me think that few do make their own desires, the desires of the country, and that this court is desired by the greater number, though not by the greater stomachs.

IN answer to the third reason, if men be contentant in the statutes of this kingdom, it will appear to be no new thing to carry great matters in general words without other particular expressing. Consider but of the statute of 26 H. VIII. which hath carried estates tails under the general words of estates of inheritance. Consider of the statute of 16 R. II. of *præmunire*, and see what great matters are thought to be carried under the word *alibi*. And therefore it is an ignorant assertion to say that the statute would have named the shires, if it had meant them.

SECONDLY, the statute had more reason to pass it over in general words, because it did not ordain a new matter, but referreth to usage: and though the statute speaks generally, yet usage speaks plainly and particularly, which is the strongest kind of utterance or expressing. *Quid verba audiam, cum facta videam.*

AND thirdly, this argument of theirs may be strongly retorted against them: for as they infer that the shires were not meant, because they were not included by name; so we infer that they are meant, because they are not excepted by name, as is usual by way of *proviso* in like cases: and our inference hath far greater reason than theirs, because at the time of the making of the statute, they were known to be under the jurisdiction: And therefore that ought to be most plainly

ly expressed, which should work a change, and not that, which should continue things, as they were.

IN answer to their fourth reason, it makes likewise plainly against them; for there be three places, where the shires be named, the one for the extinguishing of the custom of *Gavelkind*; the second for the abolishing of certain forms of assurance which were too light to carry inheritance and freehold; the third for the restraining of certain franchises to that state they were in by a former statute. In these three places the words of the statute are the lordships marchers annexed unto the counties of *Hereford*, *Salop*, &c.

Now mark, if the statute conceived the word *marches* to signify lordships marchers, what needeth this long circumlocution? It had been easilier to have said within the *marches*. But because it was conceived that the *marches* would have comprehended the whole counties, and the statute meant but of the lordships marchers annexed; therefore they were enforced to use that *periphrasis*, or length of speech.

IN answer to the fifth reason, I give two several answers; the one, that the clause of attendance is supplied by the word *incidents*; for the clause of establishment of the court hath that word, *with all incidents to the same as heretofore hath been used*: For execution is ever incident to justice or jurisdiction. The other, because it is a court, that standeth not by the act of parliament alone, but by the King's instructions, whereto the act refers. Now no man will doubt but the King may supply the clause of attendance; for if the King grant forth a commission of *oyer and terminer*, he may command what sheriff he will to attend it; and therefore there is a plain diversity between this case, and the cases they vouch of the court of Wards, Survey, and Augmentations: for they were courts erected *de novo* by parliament,

ment, and had no manner of reference either to usage or instructions ; and therefore it was necessary that the whole frame of those courts, and their authority both for judicature and execution, should be described and expressed by parliament. So was it of the authority of the Justices of *Wales* in the statute of 34. mentioned, because there are many ordinances *de novo* concerning them ; so that it was a new erection, and not a confirmation of them.

THUS have I in confutation of their reasons, greatly, as I conceive, confirmed our own, as it were with new matter ; for most of that, they have said, made for us. But as I am willing to clear your judgments in taking away the objections ; so I must farther pray in aid of your memory for those things, which we have said ; whereunto they have offered no manner of answer ; or unto all our proofs which we made, touching the intent of the statute, which they grant to be the spirit and life of this question, they said nothing : as not a word to this : That otherwise the word *marches* in the statute should be idle or superfluous, not a word to this : That the statute hath always omit the word *marches* in things, that concern only *Wales*, not a word to this : That the statute did not mean to innovate but to ratify, and therefore if the shires were in before, they are in still : not a word to the reason of the mixed government, as that it was necessary for the reclaiming of *Wales* to have them conjoyn'd with the shires ; that it was necessary for commerce and contracts, and properly for the ease of the subjects of *Wales* against the inhabitants of the shires ; that it was not probable that the parliament meant the Prince should have no jurisdiction civil in that place, where he kept his house. To all these things, which we esteem the weightiest, there is *altum silentium*, after the manner of children that skip over, where they cannot spell.

Now

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Now to pass from the intent of the word first, I will examine the proofs they have brought that the word was used in their sense after the statute 27. and 34. then I will consider what I gained, if they should prove so much; and lastly I will briefly state our own proofs, touching the use of the word.

FOR the first, it hath been said, that whereas I called the use of the word *marches* after the statute of 27. but a little chime, at most of an old word, which soon after vanished, they will now ring us a peal of statutes to prove it; but if it be a peal, I am sure it is a peal of bells, and not a peal of shot: for it clatters, but it doth not strike: for of all that catalogue of statutes find scarcely one, save those that were answered in my former argument; but we may with as good reason affirm in every of them the word *march* to be meant of the counties *marches*, as they call of the lordships *marchers*; for to begin upward

THE statute 39 *Eliz.* for the repair of *Wilton Bridge* no doubt doth mean the word *marches* of the counties; for the bridge itself is in *Herefordshire*, and the statute imposeth the charge of reparation upon *Herefordshire* by compulsory means and permitteth benevolence to be taken in *Wales* and the *marches*; who doubts, but this meant the other three shires, which have far greater use of the bridge than the remote counties of *Wales*?

FOR the statute 5 *Eliz.* it concerning perjury it hath a proviso, that it shall not be prejudicial to the council of the *marches* for punishing perjury; who can doubt, but that here *march* is meant of the shires, considering the perjuries committed in them have been punished in that court as well as in *Wales*?

FOR 2 *Ed. VI.* and the clause therein for restraining tithes of marriage portions in *Wales* and the *marches*, why should it not be meant of counties? For if any such customs had crept into the *marches*

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roached into the body of the shires but of the lordships marchers, no doubt the statute meant to restrain them as well there, as in the other places.

AND so for the statute of 32 H. VIII. which ordains that the benefit of that statute for distress to be had by *executors*, should not extend to any lordship in *Wales*, or the marches of the same where are paid, because that imports a general release ; what absurdity is there, if there of all the marches be meant for the whole shires ? For if any such custom had spread, so far the reason but of the statute is alike.

As for the statutes of 37 H. VIII. and 4 Ed. VI. for the making and appointing of the *custos rotulorum*, there the word marches must needs be taken for limits, according to the *etymology* and derivation ; for the words refer not to *Wales*, but are thus *within England and Wales, and other the King's dominions, marches and territories*, that is limits and territories ; so as I see no reason, but I may truly maintain my former assertion, that after the lordships marchers were extinct by the statute of 27. the name also of marches was discontinued, and rarely if ever used in that sense.

But if it should be granted that it was now and then used in that sense, it helps them little ; for first it is clear that the legal use of it is gone, when the thing was extinct, for *nomen est rei nomen* ; so it remains but *abusive*, as if one shall call *Gulettia Cartbage*, because it was once *Carbagge* ; and next, if the word should have both senses, and that we admit an equivocation, yet we overweigh them upon the intent, as the balance is soon cast.

YET one thing I will note more, and that is that there is a certain confusion of tongues on the other side, and that they cannot well tell themselves what they would have to be meant by the word *marches* ; for one while they say it is meant for the lordships marchers generally ; another while they

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they say that it is meant for the inward marches on *Wales* side only ; and now at last they are driven to a poor shift, that there should be left some little lordship marcher in the deck, as *casus omisus*, not annexed at all to any county ; but if they would have the statute satisfied upon that only, I say no more to them, but *aquila non rapitur muscas.*

Now I will briefly remember unto you the state of our proofs of the word.

FIRST, according to the laws of speech we prove it by the etymology or derivation, because *march* is the Saxon word for limit, and *marchio* is *comes limitaneus* ; this is the opinion of *Camden* and others.

NEXT we prove the use of the word in the like case to be for counties, by the example of the marches of *Scotland* ; for as it is prettily said in *Walker's case* by *Gaudy*, if a case have no cousin, it is a sign it is a bastard, and not legitimate ; therefore we have shewed you a cousin, or rather a brother here within our own island of the like use of the word. And whereas a great matter was made that the now middle shires were never called the marches of *Scotland*, but the marches of *England* against *Scotland*, or upon *Scotland*, it was first answered that that made no difference ; because sometimes the *marches* take their name of the inward country, and sometimes of the outward country : so that it is but *inclusive* and *exclusive* as for example, that which we call in vulgar speech this day *fortnight* excluding the day, that the law calls *quindena* including the day ; and so likewise who will make a difference between the banks of the sea, and the banks against the sea, or upon the sea ? But now to remove all scruple, we shew them *Littleton* in his chapter of *grand serjeanty* where he saith, there is a tenure by *Cornage* in the marches of *Scotland* ; and we shew them likewise the statute of 25 Ed. III. of labourers where

where they are also called the *marches of Scotland*.

THEN we shew some number of bills exhibited to the council there before the statute, where the plaintiffs have the addition of place confessed within the bodies of the shires, and no lordships marchers, and yet are laid to be in the marches.

THEN we shew diverse accounts of auditors in the Duchy from H. IV. downwards, where the indorsement is in *marchiis Walliae*, and the contents are possessions only of Hereford and Gloucestershire (for in Shropshire and Worcestershire the Duchy hath no lands) and whereas they would put it off with a *cuique in sua arte credendum*, they would believe them, if it were in matter of accounts; we do not allege them as auditors, but as those as speak English to prove the common use of the word, *loquendum ut vulgus*.

We shew likewise an ancient record of a patent to Harbert in 15 E. IV. where Kilpeck is laid to be in com. Hereford in *marchiis Walliae*; and lastly, we shew again the statute of 27 E. III. where provision is made, that men shall labour in the summer, where they dwell in the winter; and there is an exception of the people of the counties of Stafford and Lancashire, &c. and of the marches of Wales and Scotland; where it is most plain, that the marches of Wales are meant for counties, because they are coupled both with Stafford and Lancashire, which are counties, and with the marches of Scotland which are likewise counties: and as it is informed, the labourers of those four shires do come forth of their shires, and are known by the name of *Cokers* to this day.

To this we add two things, which are worthy consideration; the one that there is no reason to put us to the proof of the use of this word *marcher* sixty years ago, considering that usage speaks

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for us ; the other that there ought not to be required of us to shew so frequent an use of the word *marches* of ancient time in our sense, as they shewed in theirs, because there was not the like occasion : for when a lordship marcher was mentioned, it was of necessity to lay it in the *marches*, because they were out of all counties; but when land is mentioned in any of these counties, it is superfluous to add in the *marches*; so as there was no occasion to use the word *marches*, but either for a more brief and compendious speech to avoid the naming of the four shires, as it is in the statute of 25 E. III. and in the indorsement of accounts, or to give a court cognizance and jurisdiction, as in the bills of complaint, or *ex abundanti*, as in the record of Kilpeck.

THERE resteth the third main part, whereby they endeavour to weaken and extenuate the proofs, which we offer touching practice and possession, wherein they allege five things.

FIRST, that *Bristol* was in until 7 Eliz. and then exempted.

SECONDLY, that *Cheshire* was in until 11 Eliz. and then went out.

THIRDLY, they allege certain words in the instructions to *Cholmley* vice-president in 11 Eliz. at which time the shires were first comprehended in the instructions by name, and in these words annexed by our commission : whereupon they would infer that they were not brought in the statute but only came in by instructions, and do imagine that when *Cheshire* went out, they came in.

FOURTHLY, they say that the intermeddling with those four shires before the statute was but an usurpation and toleration rather than any lawful and settled jurisdiction ; and it was compared to that, which is done by the judges in their circuits, who end many causes upon petitions.

FIFTHLY, they allege Sir *John Mullen's* cause, where it is said *consuetudo non præjudicat veritatem*.

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THERE was moved also, though it were not by the council, but from the judges themselves, as an extenuation, or at least an obscuring of the proofs of the usage and practice, in that we shew forth no instructions from 17 H. VIII. to 1 Maria.

To these six points I will give answer, and as I conceive with satisfaction.

FOR *Bristol* I say, it teacheth them the right way, if they can follow it; for *Bristol* was not exempted by any opinion of law, but was left out of the instructions upon supplication made to the Queen.

FOR *Cheshire* we have answered it before, that the reason was, because it was not probable that the statute meant to make that shire subject to the jurisdiction of that council, considering it was not subject to the high courts at *Westminster*, in regard it was a county *Palatine*. And whereas they said, that so was *Flintshire* too, it matcheth not, because *Flintshire* is named in the statute for one of the twelve shires of *Wales*.

WE shewed you likewise effectual differences between *Cheshire* and these other shires; for that *Cheshire* hath a chancery in itself, and over *Cheshire* the Princes claim jurisdiction, as earl of *Chester*; to all which you reply nothing.

THEREFORE I will add this only, that *Cheshire* went out *secundo flumine*, with the good will of the state; and this is sought to be evicted *adverso flumine*, cross the state; and as they have opinion of four judges for the excluding of *Cheshire*, so we have the opinions of two great learned men, *Gerrard* and *Bromley* for the including of *Worcester*; whose opinions, considering it was but matter of opinion, and came not judicially in question, are not inferior to any two of the other; but we say that there is no opposition or repugnancy between them, but both may stand.

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FOR *Cholmies* instructions, the words may well stand, that those shires are annexed by commission; for the King's commission or instructions (for those words are commonly confounded) must co-operate with the statute, or else they cannot be annexed. But for that conceit that they should come in but in 11. when *Cheshire* went out, no man that is in his wits can be of that opinion, if he mark it; for we see that the town of *Glocester*, &c. is named in the instructions of 1 Mar. and no man I am sure will think that *Glocester* town should be in, and *Glostershire* out.

FOR the conceit that they had but *jurisdictionem precariam*, the presidents shew plainly the contrary; for they had coercion, and they did fine and imprison, which the judges do not upon petitions; and besides, they must remember that many of our presidents, which we did shew forth, were not of suits originally commenced there, but of suits remanded from hence out of the King's courts, as to their proper jurisdiction.

FOR Sir *John Mullen's* case, the rule is plain and found, that where the law appears contrary, usage cannot controul law, which doth not at all infringe the rule of *optima legum interpres consuetudo*; for usage may expound law, though it cannot over-rule law.

BUT of the other side I could shew you many cases, where statutes have been expounded directly against their express letter to uphold presidents and usage; as 2, 3 *Phil.* & *Mar.* upon the statute of *Westminster*, that ordained that the judges *coram quibus formatum erit appellum* shall enquire of the damages, and yet the law ruled that it shall be enquired before the judges of *nisi prius*. And the great reverence given to presidents, appeareth in 39 *H. VI.* 3 *E. IV.* and a number of other books; and the difference is exceedingly well taken in *Slade's* case, *Coke's* reports 4. that is, where the usage runs but amongst clerks,

clerks, and where it is in the eye and notice of the judge; for there it shall be presumed, saith the book, that if the law were otherwise than the usage hath gone; that either the counsel or the parties would have excepted to it, or the judges *ex officio* would have discerned of it, and found it; and we have ready for you a kalendar of judges more than sit at this table, that have exercised jurisdiction over the shires in that county.

As for exception, touching the want of certain instructions, I could wish we had them; but the want of them, in my understanding, obscureth the case little. For let me observe unto you, that we have three forms of instructions concerning these shires extant; the first names them not expressly, but by reference it doth, *viz.* that they shall hear and determine, &c. within any the places or counties within any of their commissions; and we have one of the commissions, wherein they were named; so as upon the matter they are named. And of this form is the ancient instructions before the statute 17 H. VIII. when the Princess *Mary* went down.

THE second form of instructions go farther, for they have the towns, and exempted places within the counties named, with *tanquam* as well within the city of *Glocester*, the liberties of the Duchy of *Lancaster*, &c. as within any of the counties of any of their commissions, which clearly admits the counties to be in before. And of this form are the instructions in *Mariæ*, and so long until 11 *Eliz.*.

AND the third form, which hath been continued ever since, hath the shires comprehended by some. Now it is not to be thought, but the instructions which are wanting, are according to one of these three forms, which are extant. Take then your choice, for any of them will serve to prove that the practice there was ever authorized by the instructions here; and so upon the

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whole matter, I pray report to be made to his Majesty, that the president and the council hath jurisdiction according to his instructions, over the four shires, by the true construction of the statute of 34 H. VIII.

A draught of an act against an usurious shift of gain, in delivering of commodities instead of money; made by the lord chancellor Bacon, found amongst his lordship's papers by Dr. Rawley, and recommended by him to be published.

WHÈRÈAS it is an usual practice, to the undoing and overthrowing many young gentlemen, and others, that when men are in necessity and desire to borrow money, they are answered, the money cannot be had, but that they may have commodities sold unto them upon credit, wherof they make money as they can: in which course it comes to pass, not only that such commodities are bought at extreme high rates, and sold again farre under foot to a double loss; but also that the party which is to borrow, is wrapp'd in bonds and counter bonds; so that upon a little money which he receiveth, he is subject to penalties and suits of great value.

BE it therefore enacted by the authority of the present parliament, that if any man after forty days from the end of this present session of parliament be accounted, shall sell in gross sale any quantity wares or commodities unto such a one as is no re-

...er, chapman, or known broker of the same commodities, and knowing that it is bought to be sold again, to help and furnish any person that tradeth not in the same commodity with money, he shall be without all remedy by law, custom, or decree, or otherwise to recover or demand any satisfaction for the said wares or commodities, what assurance soever he shall have by bond, surety, pawn or promise of the party, or any other in his behalf. And that all bonds and assurances whatsoever made for that purpose directly or indirectly, shall be utterly void.

AND be it farther enacted by the authority aforesaid, that every person, which shall after the time aforesaid be used or employed as a broker, mean or procurer, for the taking up of such commodities, shall forfeit for every such offence the sum of one hundred pounds, the same to be, &c. and shall be farther punished by six months imprisonment, without bail or mainprise, and by the pillory.

ORDINANCES

MADE

By the Lord Chancellor *BACON*,

For the better and more regular administration of justice in the chancery, to be daily observed, saving the prerogative of the court.

NO decree shall be reversed, altered, or ^{Decrees.} explained, being once under the great seal, but upon bill of review; and no bill of review shall be admitted, except it con-

ORDINANCES IN CHANCERY.

tain either error in law, appearing in the body of the decree, without farther examination of matters in fact, or some new matter which hath risen in time after the decree, and not any new proof which might have been used when the decree was made: nevertheless upon new proof, that is come to light after the decree made, and could not possibly have been used at the time, when the decree passed, a bill of review may be grounded by the special license of the court, and not otherwise.

2. IN case of miscasting (being a matter demonstrative) a decree may be explained, and reconciled by an order without a bill of review; not understanding by miscasting any pretended misrating or misvaluing, but only error in the auditing or numbering.

3. No bill of review shall be admitted, or any other new bill to change matter decreed, except the decree be first obeyed and performed; as if it be for land, that the possession be yielded; if it be for money, that the money be paid; if it be for evidences, that the evidences be brought in; and so in other cases which stand upon the strength of the decree alone.

4. BUT if any act be decreed to be done which extinguisheth the parties right at the common law, as making of assurance or release, acknowledging satisfaction, cancelling of bonds, or evidences, and the like; those parts of the decree are to be spared until the bill of review be determined; but such sparing is to be warranted by publick order made in court.

5. No bill of review shall be put in, except the party that prefers it enter into recognizance with sureties for satisfying of costs and damages for the delay, if it be found against him.

6. No decrees shall be made upon pretence of equity, against the express provision of an act of parliament: nevertheless if the construction of such act of parliament hath for a time gone one way

way in general opinion and reputation, and after by a later judgment hath been controlled, then relief may be given upon matter of equity, for cases arising before the said judgment, because the subject was in no default.

7. IMPRISONMENT for breach of a decree is in nature of an execution, and therefore the custody ought to be straight, and the party not to have any liberty to go abroad, but by special license of the lord chancellor; but no close imprisonment is to be, but by express order for wilful and extraordinary contempts and disobedience, as hath been used.

8. IN case of enormous and obstinate disobedience in breach of a decree, an injunction is to be granted *sub pæna* of a sum; and upon affidavit, or other sufficient proof, of persisting in contempt, fines are to be pronounced by the lord chancellor in open court, and the same to be extracted down into the hamper if cause be, by a special order.

9. IN case of a decree made for the possession of land, a writ of execution goeth forth; and if that be disobeyed, then process of contempt according to the course of the court against the person to commission of rebellion; and then a serjeant at arms by special warrant, and in case the serjeant at arms cannot find him, or be resisted upon the coming in of the party, and his commitment, if he persist in disobedience, an injunction is to be granted for the possession; and in case that also be disobeyed, then a commission to put him in possession.

10. WHERE the party is committed for breach of a decree, he is not to be enlarged until the decree be fully performed in all things, which are to be done presently. But if there be other parts of the decree to be performed at days, or times to come, then he may be enlarged by order of court, upon recognizance, with sureties to be put

ORDINANCES IN CHANCERY.

put in for the performance *de futuro*, otherwise not.

11. WHERE causes come to a hearing in court, no decree bindeth any person who was not served with process *ad audiendum judicium*, according to the course of the court, or did appear in person in court.

12. No decree bindeth any that cometh in *bona fide*, by conveyance from the defendant before the bill exhibited, and is made no party, neither by bill nor order: but where he comes in *pendente lite*, and while the suit is in full prosecution, and without any colour of allowance or privyty of the court, there regularly the decree bindeth; but if there were any intermission of suit, or the court made acquainted with the conveyance, the court is to give order upon the special matter according to justice.

13. WHERE causes are dismissed upon full hearing, and the dismission signed by the lord chancellor, such causes shall not be retained again, nor new bill admitted, except it be upon new matter, like to the case of the bill of review.

14. IN case of other dismissions, which are not upon hearing of the cause, if any new bill be brought, the dismission is to be pleaded; and after reference and report of the contents of both suits and consideration taken of the causes of the former dismission, the court shall rule the retaining or dismissing of the new bill according to justice and the nature of the case.

15. ALL suits grounded upon wills nuncupative, leases parol, or upon long leases, that tend to the defacing of the King's tenures, for the establishing of perpetuities, or grounded upon remainders put into the crown, to defeat purchasers; or for brokage or rewards to make marriages; or for bargains at play and wagers; or for bargains for offices contrary to the statute of 2 Edw, VI. or for contracts upon usury or simony, are re-

early to be dismissed upon motion, if they be the sole effect of the bill; and if there be no special circumstances to move the court to allow them a proceeding, and all suits under the value of ten pounds, are regularly to be dismissed.

16. DISMISSESS are properly to be prayed, and had, either upon hearing, or upon plea unto the bill, when the cause comes first into the court; but dismissals are not to be prayed after the parties have been at charges of examination, except it be upon special cause.

17. IF the plaintiff discontinue by prosecution, after all the defendants have answered above the space of one whole term, the cause is to be dismissed of course without any motion; but after replication put in, no cause is to be dismissed without motion and order of the court.

18. DOUBLE vexation is not to be admitted; but if the party sue for the same cause at common law, and in chancery, he is to have a day given to make his election where he will proceed, and in default of such election to be dismissed.

19. WHERE causes are removed by special *cerviorari* upon a bill, containing matter of equity, the plaintiff is, upon receipt of his writ, to put in bond to prove his suggestion within fourteen days after the receipt, which if he do not prove, then upon certificate from either of the examiners presented to the lord chancellor, the cause shall be dismissed with costs, and a *procedendo* to be granted.

20. No injunction of any nature shall be granted, revived, dissolved, or stayed upon any private petition.

21. No injunction to stay suits at the law shall be granted upon priority of suit only, or upon surmise of the plaintiff's bill only; but upon matter confessed in the defendant's answer, or matter of record, or writing plainly appearing, or when the defendant is in contempt for not answering,

or

or that the debt desired to be stayed appeareth to be old, and hath slept long, or the creditor or the debtor hath been dead some good time before the suit brought.

22. WHERE the defendant appears not, but fits an attachment; or when he doth appear, and departs without answer, and is under attachment for not answering; or when he takes oath, he cannot answer without sight of evidences in the country; or where after answer he sues at common law by attorney, and absents himself beyond sea; in these cases an injunction is to be granted for the stay of all suits at the common law, until the party answer or appear in person in court, and the court give farther order: but nevertheless upon answer put in, if there be no motion made the same term, or the next general seal after the term, to continue the injunction in regard of the insufficiency of the answer put in, or in regard of the matter confessed in the answer, then the injunction to die and dissolve without any special order.

23. IN the case aforesaid, where an injunction is to be granted for stay of suits at the common law, if the like suit be in the chancery, either by *scire facias*, or privilege, or *English bill*, then the suit is to be stayed by order of the court, as it is in other courts by injunction, for that the court cannot enjoin itself.

24. WHERE an injunction hath been obtained for stay of suits, and no prosecution is had for the space of three terms, the injunction is to fall of itself without farther motion.

25. WHERE a bill comes in after an arrest at the common law for a debt, no injunction shall be granted without bringing the principal money into court, except there appear in the defendant's answer, or by sight of writings, plain matter tending to discharge the debt in equity: but if an injunction be awarded and disobeyed, in that case no money shall be brought in, or deposited in regard of the contempt.

26. IN-

26. INJUNCTIONS for possession are not to be granted before a decree, but where the possession hath continued by the space of three years, before the bill exhibited, and upon the same title; and not upon any title by lease, or otherwise determined.

27. IN case where the defendant sits all the process of contempt, and cannot be found by the serjeant at arms, or resists the serjeant, or makes rescue, a sequestration shall be granted of the land in question; and if the defendant render not himself within the year, then an injunction for the possession.

28. INJUNCTIONS against felling of timber, ploughing up of ancient pastures, or for the maintaining of inclosures, or the like, shall be granted according to the circumstances of the case; but not in case where the defendant upon his answer claimeth an estate of inheritance, except it be where he claimeth the land in trust, or upon some other special ground.

29. No sequestration shall be granted but of lands, leases, or goods in question, and not of any other lands or goods, not contained in the suits.

30. WHERE a decree is made for rent to be paid out of land, or a sum of money to be levied out of the profits of land, there a sequestration of the same lands being in the defendant's hands may be granted.

31. WHERE the decrees of the provincial council, or of the court of requests, or the Queen's court, are by continuancy or other means interrupted; there the court of chancery upon a bill referred for corroborations of the same jurisdictions, decrees, and sentences, shall give remedy.

32. WHERE any cause comes to a hearing that hath been formerly decreed in any other of the king's courts of justice at *Westminster*, such decree

ORDINANCES IN CHANCERY.

Suits after
judgment.

cree shall be first read, and then to proceed to the rest of the evidence on both sides.

33. SUITS after judgment may be admitted according to the ancient custom of the chancery and the late royal decision of his Majesty, record after solemn and great deliberation: but in such suits it is ordered, that bond be put in with good sureties to prove the suggestions of the bill.

34. DECREES upon suits brought after judgment shall contain no words to make void or weaken the judgment, but shall only correct the corrupt conscience of the party, and rule him to make restitution, or perform other acts, according to the equity of the case.

Orders, and the Office of the REGI STERS.

35. THE registers are to be sworn, as have been lately ordered.

36. IF any order shall be made, and the court not informed of the last material order formerly made, no benefit shall be taken by such order, granted by abuse and surreption; and to that end the registers ought duly to mention the former order in the later.

37. No order shall be explained upon any private petition but in court as they are made, and the register is to set down the orders as they were pronounced by the court, truly at his peremptory view without troubling the lord chancellor by any private attending of him to explain his meaning, and if any explanation be desired, it is to be done by publick motion, where the other party may be heard.

38. No draught of any order shall be delivered by the register to either party, without keeping

copy by him, to the end that if the order be not entered, nevertheless the court may be informed what was formerly done, and not put to new trouble and hearing; and to the end also that knowledge of orders be not kept back too long from either party, but may presently appear at the office.

39. WHERE a lease hath been debated upon hearing of both parties, and opinion hath been delivered by the court, and nevertheless the cause referred to treaty, the registers are not to omit the opinion of the court, in drawing of the order of reference, except the court doth specially declare that it be entred without any opinion either way; in which case nevertheless the registers are out of their short note, to draw up some more full remembrance of that that passed in court, to inform the court if the cause come back and cannot be agreed.

40. THE registers upon sending of their draught unto the counsel of the parties, are not to respect the interlineations, or alterations of the said counsel (be the said counsel never so great,) farther, than to put them in remembrance of that which was truly delivered in court, and so to conceive the order upon their oath and duty, without any farther respect.

41. THE registers are to be careful in the penning and drawing up of decrees, and special matters of difficulty and weight; and therefore when they present the same to the lord chancellor, they ought to give him understanding which are those decrees of weight, that they may be read and reviewed before his lordship sign them.

42. THE decrees granted at the rolls are to be presented to his lordship, with the orders whereupon they are drawn, within two or three days after every term.

43. INJUNCTIONS for possession, or for stay of suits after verdict are to be presented to his lordship,

ORDINANCES IN CHANCERY.

ship, together with the orders whereupon they go forth, that his lordship may take consideration of the order before he sign them.

44. WHERE any order upon the special nature of the case shall be made against any of these general rules, there the register shall plainly and expressly set down the particulars, reasons and grounds, moving the court to vary from the general rule.

References.

45. No reference upon a demurrer, or question touching the jurisdiction of the court, shall be made to the masters of the chancery; but such demurrers shall be heard and ruled in court, or by the lord chancellor himself.

46. No order shall be made for the confirming or ratifying of any report without day first given, by the space of a sevenight at the least, to speak to it in court.

47. No reference shall be made to any masters of the court, or any other commissioners to hear and determine where the cause is gone so far as to examination of witnesses, except it be in special cases of parties near in blood, or of extreme poverty, or by consent and general reference of the estate of cause, except it be by consent of the parties to be sparingly granted.

48. No report shall be respected in court, which exceedeth the warrant of reference.

49. THE masters of the court are required not to certify the state of any cause, as if they would make breviate of the evidence on both sides, which doth little ease the court, but with some opinion or otherwise in case they think it too doubtful to give opinion, and therefore make such special certificate, the cause is to go on to a judicial hearing, without respect had to the same.

50. MATTERS of account, unless it be in very weighty causes, are not fit for the court, but to be prepared by reference, with this difference nevertheless, that the cause comes first to a hearing

and upon the entrance into a hearing, they may receive some direction, and be turned over to have the accounts considered, except both parties before a hearing do consent to a reference of the examination of the accounts, to make it more ready for a hearing.

51. THE like course to be taken for the examination of court-rolls, upon customs and copies, which shall not be referred to any one master, but to two masters at the least.

52. No reference to be made of the insufficiency of an answer, without shewing of some particular point of the defect, and not upon surmise of the insufficiency in general.

53. WHERE a trust is confessed by the defendant's answer there needeth no farther hearing of the cause, but a reference presently to be made of the account, and so to go on to a hearing of the accounts.

54. IN all suits where it shall appear, upon the hearing of the cause, that the plaintiff had not *probabilem causam litigandi*, he shall pay unto the defendant his utmost costs, to be asseſſed by the court.

55. If any bill, answers, replication, or re-binder shall be found of an immoderate length, both the party and the council under whose hand it passeth shall be fined.

56. If there be contained in any bill, answer, or other pleadings interrogatory, any matter libellous or flanderous against any that is not party to the suit, or against such as are parties to the suit, upon matters impertinent, or in derogation of the settled authorities of any of his Majesty's courts, such bills, answers, pleadings, or interrogatories shall be taken off the file and suppressed, and the parties severally punished by commitment or ignominy, as shall be thought fit for the abuse of the court, and the counsellors at law,

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ORDINANCES IN CHANCERY.

who have set their hands, shall likewise receive reproof or punishment, if cause be.

~~+~~ 57. DEMURRERS and pleas which tend to discharge the suit shall be heard first upon every day of orders, that the subject may know whether he shall need farther attendance or no.

58. A demurrer is properly upon matter defective, contained in the bill itself, and no foreign matter; but a plea is of foreign matter to discharge or stay the suit, as that the cause hath been formerly dismissed, or that the plaintiff is outlawed, or excommunicated; or there is another bill depending for the same cause, or the like, and such plea may be put in without oath, in case where the matter of the plea appears upon record; but if it be any thing that doth not appear upon record, the plea must be upon oath.

59. No plea of outlawry shall be allowed without pleading the record *sub pede sigilli*, nor plea of excommunication, without the seal of the ordinary.

60. WHERE any suit appeareth upon the bill to be of the natures which are regularly to be dismissed according to the fifteenth ordinance, such matter is to be set forth by way of demur-
rer.

61. WHERE an answer shall be certified insufficient, the defendant is to pay costs; and if a secon^d answer be returned insufficient, in the points before certified insufficient, then double costs, and upon the third treble costs, and upon the fourth quadruple costs, and then to be committed also until he hath made a perfect answer, and to be examined upon interrogatives touching the points defective in his answer; but if any answer be certified sufficient, the plaintiff is to pay costs.

62. N

62. No insufficient answer can be taken hold of after replication put in, because it is admitted sufficient by the replication.

63. An answer to a matter charged as the defendant's own fact must be direct, without saying it is to his remembrance, or as he believeth, if it be laid down within seven years before; and if the defendant deny the fact, he must traverse it directly, and not by way of negative pregnant; as if a fact be laid to be done with diverse circumstances, the defendant may not traverse it literally as it is laid in the bill, but must traverse the point of substance; so if he be charged with the receipt of one hundred pounds, he must traverse that he hath not received a hundred pounds, or any part thereof; and if he have received part, he must set forth what part.

64. If a hearing be prayed upon bill and answer, the answer must be admitted to be true in all points, and a decree ought to be made, but upon hearing the answer read in court.

65. WHERE no counsel appears for the defendant at the hearing, and the process appears to have been served, the answer of such defendant is to be read in court.

66. No new matter is to be contained in any replication, except it be to avoid matter set forth in the defendant's answer.

67. ALL copies in chancery shall contain fifteen lines in every sheet thereof, written orderly and unwantfully, unto which shall be subscribed the name of the principal clerk of the office where it is written, or his deputy, for whom he will answer, for which only subscription no fee at all shall be taken.

68. ALL commissions for examination of witnesses shall be *super interr. inclusis* only, and no return of depositions into the court shall be received, but such only as shall be either comprised in one roll, subscribed with the name of the

Commissions;
examinations,
and depositi-
ons.

ORDINANCES IN CHANCERY.

commissioners, or else in diverse rolls, whereof each one shall be so subscribed.

69. IF both parties join in commissions, and upon warning given the defendant bring his commissioners, but produceth no witnesses, nor ministreth interrogatories, but after seek a new commission, the same shall not be granted: but nevertheless upon some extraordinary excuse of the defendant's default, he may have liberty granted by special order to examine his witnesses in court upon the former interrogatories, giving the plaintiff, or his attorney notice, that he may examine also if he will.

70. THE defendant is not to be examined upon interrogatories, except it be in very special cases, by express order of the court, to sift out some fraud or practice pregnantly appearing to the court, or otherwise upon offer of the plaintiff to be concluded by the answer of the defendant without any liberty to disprove such answer, or to impeach him after of perjury.

71. DECREES in other courts may be read upon hearing without the warrant of any special order: but no depositions taken in any other court are to be read but by special order, and regularly the court granteth no order for reading of depositions, except it be between the same parties, and upon the same title and cause of suit.

72. No examination is to be had of the credit of any witness but by special order, which is sparingly to be granted.

73. WITNESSES shall not be examined *in perpetuum rei memoriam*, except it be upon the ground of a bill first put in, and answer thereunto made, and the defendant or his attorney made acquainted with the names of the witnesses that the plaintiff would have examined, and so publication to be of such witnesses with this restraint nevertheless, that no benefit shall be taken of the depositions of such witnesses, in case they may be brought

brought *viva voce* upon the trial, but only to be used in case of death before the trial, or age, or impotency, or absence out of the realm at the trial.

74. No witnesses shall be examined after publication, except it be by consent, or by special order, *ad informandam conscientiam judicis*, and then to be brought close sealed up to the court to peruse or publish, as the court shall think good.

Ad informan-
dam conser-
tiam judicis.

75. No affidavit shall be taken or admitted by any master of the chancery, tending to the proof or disproof of the title, or matter in question, or touching the merits of the cause, neither shall any such matter be colourably inserted in any affidavit for serving of process.

76. No affidavit shall be taken against affidavit, as far as the masters of the chancery can have knowledge; and if any such be taken, the latter affidavit shall not be used nor read in court.

77. In case of contempts granted upon force or ill words, upon serving of process, or upon words of scandal of the court, proved by affidavit, the party is forthwith to stand committed; but for other contempts against the orders or decrees of the court an attachment goes for the first upon affidavit made, and then the party is to be examined upon interrogatories, and his examination referred; and if upon his examination he confess matter of contempt, he is to be committed; if not, the adverse party may examine witnesses to prove the contempt; and therefore if the contempt appear, the party is to be committed; but if not, or if the party that pursues the contempt do fail in putting in interrogatories, or other prosecution, or fail in the proof of the contempt, then the party charged with the contempt is to be discharged with good costs.

78. THEY that are in contempt, specially so far proclamation of rebellion, are not to be here,

ORDINANCES IN CHANCERY.

neither in that suit, nor any other, except the court of special grace suspend the contempt.

79. IMPRISONMENT upon contempt for matters past, may be discharged of grace after sufficient punishment, or otherwise dispensed with : but if the imprisonment be for non performance of any order of the court in force, they ought not to be discharged except they first obey, but the contempt may be suspended for a time.

80. INJUNCTIONS, sequestrations, dismissions, retainers upon dismissions, or final orders, are not to be granted upon petitions.

81. No former order made in court is to be altered, crossed, or explained upon any petition; but such orders may be stayed upon petition for a small stay, until the matter may be moved in court.

82. No commission for examination of witnesses shall be discharged ; nor no examinations or depositions shall be suppressed upon petition, except it be upon point of course of the court first referred to the clerks, and certificate thereupon.

83. No demur shall be over-ruled upon petition.

84. No *scire facias* shall be awarded upon recognizances not enrolled, nor upon recognizances enrolled, unless it be upon examination of the record with the writ ; nor no recognizance shall be enrolled after the year, except it be upon special order from the lord chancellor.

85. No writ of *ne exeat regnum*, prohibition, consultation, statute of *Northampton*, *certiorari* special, or *procedendo* special, or *certiorari* or *procedendo* general, more than one in the same cause ; *babeas corpus*, or *corpus cum causa vi laice removend'*, or restitution thereupon, *de coronatore & viridario eligendo*, in case of a moving *de homine repleg. affiz.* or special patent, *inde ballia amovend'* *certiorari super presentationibus fact. coram commissariis Seward*, or *ad quod dampnum shall pass without warrant under*

der the lord chancellor's hand, and signed by him, save such writs as *ad quod dampnum*, as shall be signed by master attorney.

86. WRITS of privilege are to be reduced to a better rule, both for the number of persons that shall be privileged, and for the case of the privilege; and as for the number it shall be set down by *schedule*: for the case it is to be understood, that besides parties privileged as attendants upon the court, suitors and witnesses are only to have privilege, *eundo, redeundo, & morando*, for their necessary attendance, and not otherwise; and that such writ of privilege dischargeth only an arrest upon the first process, but yet where at such times of necessary attendance the party is taken in execution, it is a contempt to the court, and accordingly to be punished.

87. No *supplicavit* for the good behaviour shall be granted, but upon articles grounded upon the oath of two at the least, or certificate of any one justice of assize, or two justices of the peace with affidavit, that it is their hands, or by order of the star-chamber, or chancery, or other of the King's courts.

88. No recognizance of the good behaviour, and the peace taken in the country, and certified into the petty-bag, shall be filed in the year without warrant from the lord chancellor.

89. WRITS of *ne exeat regnum* are properly to be granted according to the suggestion of the writ, in respect of attempts prejudicial to the King and state, in which case the lord chancellor will grant them upon prayer of any the principal secretaries without cause shewing, or upon such information as his lordship shall think of weight: but otherwise also they may be granted according to the practice of long time used in case of interlopers in trade, great bankrupts, in whose estate many subjects are interested, or other cases that

concern multitudes of the King's subjects, also in case of duels and diverse others.

90. ALL writs, certificates, and whatsoever other process *ret. coram Rege in Canc.* shall be brought into the chapel of the rolls, within convenient time after the return thereof, and shall be there filed upon their proper files and bundles as they ought to be, except the depositions of witnesses, which may remain with any of the six clerks by the space of one year next after the cause shall be determined by decree, or otherwise be dismissed.

91. ALL injunctions shall be inrolled, or the transcript filed, to the end that if occasion be, the court may take order to award writs of *scire facias* thereupon, as in ancient time hath been used.

92. ALL days given by the court to sheriffs to return their writs, or bring their prisoners upon writs of privilege, or otherwise between party and party shall be filed, either in the register's office, or in the petty-bag respectively; and all recognizances taken to the King's use, or unto the court, shall be duly inrolled in convenient time, with the clerks of the inrollment, and kalendars made of them, and the kalendars every *Michaelmas* term to be presented to the lord chancellor.

93. IN case of suits upon the commissions for charitable uses to avoid charge, there shall need no bill, but only exceptions to the decree, and answer forthwith to be made thereunto; and thereupon, and upon sight of the inquisition, and the decree brought unto the lord chancellor by the clerk of the petty-bag, his lordship, upon perusal thereof, will give order under his hand for an absolute decree to be drawn up.

94. UPON suit for the commission of sewards, the names of those that are desired to be commissioners are to be preferred to the lord chancellor in

writing; then his lordship will send the names of some privy counsellor, lieutenant of the shire, justices of assize, being resident in the parts for which the commission is prayed, to consider of them, that they be not put in for private respects; and upon the return of such opinion, his lordship will farther order for the commission to pass.

95. No new commission of rewards shall be granted while the first is in force, except it be upon discovery of abuse or fault in the first commissioners, or otherwise upon some great or weigh-ground.

96. No petition of bankrupt shall be granted but upon petition first exhibited to the lord chancellor, together with names presented, of which his lordship will take consideration, and ways single some learned in the law with the rest; yet so as care be taken that the same parties be not too often used in commissions; and likewise care is to be taken that bond with good surety be entered into in two hundred pounds at least, to prove him a bankrupt.

97. No commission of delegates in any case of weight shall be awarded, but upon petition presented to the lord chancellor, who will name the commissioners himself, to the end they may be persons of convenient quality, having regard to the weight of the cause, and the dignity of the court from whom the appeal is.

98. ANY man shall be admitted to defend in *forma pauperis* upon oath, but for plaintiffs they are ordinarily to be referred to the court of requests, or to the provincial counsels, if the case arise in their jurisdictions, or to some gentlemen in the country, except it be in some special cases of consideration, or potency of the adverse party.

99. LICENSES to collect for losses by fire or water are not to be granted, but upon good certificate, and not for decays of suretyship or debt, or any other casualties whatsoever; and they are rarely

rarely to be renewed ; and they be to be directed unto the county where the loss did arise, if it were by fire, and the counties that abut upon it, as the case shall require ; and if it were by sea, then unto the county where the port is, from whence the ship went, and to some counties adjoining.

100. No exemplification shall be made of letters patent (*inter alia*) with omission of the general words ; nor of records made void, or cancelled ; nor of the decrees of this court not enrolled ; nor of depositions by parcel ; nor of depositions in court, to which the hand of the examiner is not subscribed ; nor of records of the court not being enrolled or filed ; nor of records of any other court, before the same be duly certified to this court, and orderly filed here ; nor of any records upon the sight and examination of any copy in paper, but upon sight and examination of the original.

101. AND because time and experience may discover some of these rules to be inconvenient, and some other to be fit to be added ; therefore his lordship intendeth in any such case from time to time to publish any such revocations or additions.

THE

LEARNED READING

O F

Sir FRANCIS BACON,

One of her MAJESTY's Counsel at Law,

UPON THE

STATUTE of USES:

Being his double Reading to the Honourable SOCIETY of GRAYS-INN.

HAVE chosen to read upon the law of uses made 27 H. VIII. a law whereupon the inheritances of this realm are tossed at this day like a ship upon the sea, in such sort, that it is hard to say which bark will sink, and which will get to the haven; that is to say, what assurances will stand good, and what will not; whether is this any lack or default in the pilots their grave and learned judges? But the tides and currents of received errors, and unwarranted and abusive experience have been so strong, as they were not able to keep a right course according to the law, so as this statute is in great part as a law made in the parliament, held 35 Reginæ; for in 37 Reginæ, by the notable judgment, upon solemn arguments of all the judges assembled in the exchequer chamber, in the famous case between

Dillon

Dillon and Frayne, concerning an assurance by Chudley, this law began to be reduced to a true and sound exposition, and the false and perverted exposition, which had continued for so many years, though never countenanced by any rule or authority of weight, but only entertained in a popular conceit, and in practice at adventure, grew to be controlled; since which time (as it cometh to pass always upon the first reforming of inveterate errors) many doubts, and perplexed questions have risen, which are not yet resolved, nor the law thereupon settled: the consideration whereof moved me to take the occasion of performing this particular duty to the house, to see if I could by my travel, bring to a more general good of the commonwealth.

HEREIN, though I could not be ignorant of the difficulty of matter, which he that taketh in hand shall soon find, or much less of my own unablenes, which I had continual sene and feeling of; yet because I had more means of absolution than the younger sort, and more leisure than the greater sort, I did think it not impossible to work some profitable effect; the rather because where an inferior wit is bent and conversant upon one subject, he shall many times with patience and meditation dissolve and undo many of the knots, which a greater wit distract-
ed with many matters would rather cut in two than unknot: And at least if my invention or judgment be too barren, or too weak; yet by the benefit of other arts, I did hope to dispose or digest the authorities or opinions, which are in cases of use, in such order and method, as they should take light one from another, though they took no light from me. And like to the matter of my reading shall my manner be, for my meaning is to revive and recontinue the ancient form of reading, which you may see in Mr. Frowickes, upon the prerogative, and all other readings of
ancient

ancient time, being of less ostentation and more fruit, than the manner lately accustomed; for the use then was substantially to expound the statutes, by grounds and diversities; as you shall find the reading still to run upon case of the like law, and contrary law; whereof each one includes the learning of a difference: and not to stir concise and subtle doubts, or to contrive tedious and intricate cases, whereof all saving one are buried, and the greater part of that one case which is taken, is commonly nothing to the matter in hand; but my labour shall be in the ancient course, to open the law upon what are doubts, and what not doubts upon this law.

Expositio Statuti.

THE exposition of this statute consists, upon the matter without the statutes: upon the matter within the statute.

THREE things, are to be considered concerning these statutes, and all other statutes, which are helps and inducements to the right understanding of my statute, and yet are no part of the statute itself.

1. THE consideration of the statute at the common law.

2. THE consideration of the mischief which the statute intendeth to redress, as also any other mischief, which an expositor of the statute this way that way may breed.

3. CERTAIN maxims of the common law, touching exposition of statutes: having therefore framed six divisions according to the number of readings upon the statute itself, I have likewise divided the matter without the statute into six introductions or discourses, so that for every day's reading I have made a triple provision.

1. A PREFACE, or introduction.

2. A

READING ON THE STATUTE OF USES.

2. A DIVISION upon the law itself.

3. A FEW brief cases, for exercise and argument.

The last of which I would have forborn, and according to the ancient manner, you should have taken some of my points upon my divisions, one, two, or more as you should have thought good; save that I had this regard, that the younger sort of the bar were not so conversant upon matters upon the statutes; and for that case I have interlaced some matters at the common law that are more familiar within the books.

1. THE first matter I will discourse unto you, is the nature and definition of an use, and its inception and progression before the statute.

J22-J24

J24-

2. THE second discourse shall be of the second spring of this tree of uses since the statute.

3. THE third discourse shall be of the estate of the assurances of this realm at this day upon uses, and what kind of them is convenient and reasonable, and not fit to be touched, as far as sense of law and natural construction of the statute will give leave, and what kind of them is inconvenient and meet to be suppressed.

4. THE fourth discourse shall be of certain rules and expositions of laws applied to this present purpose.

5. THE fifth discourse shall be of the best course to remedy the same inconveniences now a foot, by construction of the statute, without offering violence to the letter or sense.

6. THE sixth and last discourse shall be of the best course to remedy the same inconveniences, and to declare the law by act of parliament; which last I think good to reserve and not to publish.

THE nature of a use is best discerned by considering what it is not, and then what it is; for it is the nature of all human science and knowledge to proceed most safely by negative and exclusive, to what is affirmative and inclusive.

FIRST, use is no right, title, or interest in law, and therefore master attorney who read upon this statute said well, that there are but two rights:

Jus in Re : Jus ad Rem.

THE one is an estate which is *Jus in Re*, the other a demand which is *Jus ad Rem*, but a use is neither; so that in 24 H. VIII. it is said that the saving of the statute of 1 R. III. which saveth any right or interest of intails, must be understood of intails of the possession, and not of the part of the use, because a use is no right nor interest; so again, you see Littleton's conceit, that a use should amount to a tenancy at will, whereupon a release might well inure, because of priority, is controlled by 4 & 5 H. VII. and divers other books, which say that *cesty que use* is punishable in an action of trespass towards the feoffees; only 5 H. V. seemeth to be at some discord with other books, where it is admitted for law, that if there be *cesty que use* of an advowson, and he be out-lawed in a personal action, the King should have the presentment, which case master Evans in the argument of Chudley's case did seem to reconcile thus; where *cesty que use* being out-law'd, had presented in his own name, there the King should remove his incumbent, and no such thing can be collected upon that book; and therefore I conceive the error grew upon this, that because it was generally thought, that a use was but a pernancy of profits; and then again because the law is, that upon outlawries, upon personal actions, the King shall have the pernancy of profits, they took that to be one and the self same thing which *cesty que use* had, and which the King was intitled unto, which was not so; for the King had remedy in law for his pernancy of profits, but *cesty que use* had none. The books go farther and say, that a use is nothing, as in 2 H.

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VII. *dett fuit port,* and counted *sur leas* for years rendering rent, &c. The defendant pleaded in bar, that the plaintiff *nihil habuit tempore dimissionis;* the plaintiff made a special replication, and shewed that he had an use, and issue joined upon that; wherefore it appeareth, that if he had taken issue upon the defendant's plea, it should have been found against him. So again in 4 Reginæ, in the case of the lord *Sands*, the truth of the case was a fine levied by *cesty que use* before the statute, and this coming in question since the statute upon an averment by the plaintiff *quod partes finis nihil habuerint*, it is said that the defendant may shew the special matter of the use, and it shall be no departure from the first pleading of the same; and it is said farther that the averment given in 4 H. VII. *quod partes finis nihil habuerint, nec in possessione, nec in usu,* was ousted upon this statute of 27 Hen. VIII. and was no more now to be accepted: but yet it appears, that if issue had been taken upon the general averment, without the special matter shewed, it should have been found for him that took the averment, because a use is nothing. But these books are not to be taken generally or grossly, for we see in the same books, when an use is specially alleged, the law taketh knowledge of it; but the sense of it is, that use is nothing for which remedy is given by the course of the common law, so as the law knoweth it, but protects it not; and therefore when the question cometh whether it hath any being in nature and conscience the law accepteth of it; and therefore Littleton's case is good law, that he which hath but forty shillings free-hold in use, shall be sworn in an inquest, for it is ruled *secundum dominium naturale*, and not *secundum dominium legitimum*, *nam natura dominus est, quia fructum ex re percipit.* And some doubt if upon subsidies and taxes *cesty que use* should be valued as an owner: so likewise

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likewise if *cesay que use* had resold his use unto the feoffee for six pound, or contracted with a stranger for the like sum, there is no doubt but it is a good condition or contract whereon to ground an action upon the case: for money for release of a suit in the chancery is a good *quid pro quo*; therefore to conclude, though a use be nothing in law to yield remedy by course of law, yet it is somewhat in reputation of law and conscience, for that may be somewhat in conscience which is nothing in law, like as that may be something in law which is nothing in conscience; as if the feoffees had made a feoffment over in fee, *bona fide*, upon good consideration, and upon a *subpæna* brought against them, they pleaded this matter in chancery, this had been nothing in conscience, not as to discharge them of damages.

A SECOND negative fit to be understood is, that a use is no covin, nor is it a collusion, as the word is now used; for it is to be noted, that where a man doth remove the state and possession of land, or goods, out of himself unto another upon trust, it is either a special trust, or a general trust.

THE special trust is either lawful or unlawful.

THE special trust unlawful, is according to the case provided for by ancient statutes of the profits; as where it is to defraud creditors, or to get men to maintain suits, or to defeat the tenancy to the *præcipe*, or the statute of *Mantmain*, or the lords of their wardships or the like; and those are termed frauds, covins, or collusions.

THE special trust lawful is, as when I infeoff some of my friends, because I am to go beyond the seas, or because I would free the land from some several statute, or bond which I am to enter into, or upon intent to be infeoff'd, or intent to be vouched, and so to suffer a common recovery, or upon intent that the feoffees shall infeoff over a stranger, and infinite the like in-

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tents and purposes, which fall out in mens dealings and occasions: and this we call confidence, and the books do call them intents; but where the trust is not special, nor transitory, but general and permanent, there it is a use; and therefore these three are to be distinguished, and not confounded by covin, confidence and use.

So as now we are come by negatives to the affirmative, what a use is, agreeable to the definition in *Plowden*, 352. *Delamer's case*, where it is said:

Use is a trust reposed by any person in the terre-tenant, that he may suffer him to take the profits, and he that will perform his intent.) But it is a shorter speech to say, that

| *Usus est dominium fiduciarium*: Use is an owner's life in trust.

So that *usus & status, sive possessio, potius differunt secundum rationem fori quam secundum naturam rei*, for that one of them is in court of law, the other in court of conscience; and for a trust which is the way to an use, it is exceeding well defined by a civilian of great understanding:

Fides est obligatio conscientiae unius ad intentionem alterius.

AND they have a good division likewise of rights.

Jus precarium : Jus fiduciarium : Jus legitimum.

1. A RIGHT in courtesy, for the which there is no remedy at all.

2. A RIGHT in trust, for which there is a remedy only but in conscience.

3. A RIGHT in law.

So

So much of the nature and definition of an use.

It followeth to consider the parts and properties of an use, wherein by the consent of all books; and it was distinctly delivered by justice *Walmesley* in 36 of *Elizabeth*:

THAT a trust consisteth upon three parts.

THE first, that the feoffee will suffer the feoff for to take the profits.

THE second, that the feoffee upon request of the feoffor, or notice of his will, will execute the estates to the feoffor, or his heirs, or any other by his direction.

THE third, that if the feoffee be disseised, and so the feoffor disturbed, the feoffee will re-enter, or bring an action to re-continue the possession, so that those three, pernancy of profits, execution of estates, and defence of the land, are the three points of trust.

THE properties of an use they are exceeding well set forth, by the former justice in the same case; and they be three:

1. USES (saith he) are created by confidence.

2. PRESSED by privity, which is nothing else but a continuance of the confidence without interruption; and

3. ORDERED and guided by conscience: either by the private conscience of the feoffee; or the general conscience of the realm which is chancery.

THE two former of which (because they be matters more thoroughly beaten, and we shall have occasion hereafter to handle them) we will not now debate upon:

BUT the third, we will speak somewhat of; both because it is a key to open many of the true reasons, and termings of uses, and because it tendeth to decide our great and principal doubts at this day.

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COOKE solicitor entring into his argument of Chudley's case, said sharply and fitly : I will put never a case but it shall be of an use, for a use in law hath no fellow ; meaning, that the learning of uses is not to be matched with other learnings. Anderson, chief justice, in the argument of the same case, did truly and profoundly controul the vulgar opinion collected upon 5 E. IV. that there might be *possessio fratriss* of a use ; for he said that it was no more but that the chancellor would consult with the rules of law, where the intention of the parties did not specially appear ; and therefore the private conceit which Glanvile, justice, cited in the 42 Reginæ in the case of Corbet, in the common pleas, of one of Lincolns-Inn, whom he named not, but seemed to allow, is not found ; which was, that a use was but a limitation, and did ensue the nature of a possession.

THIS very conceit was set on foot in 27 H. VIII. in the lord Darcie's case, in which time they began to heave at uses ; for thereafter the realm had many ages together put in ure the passage of uses by will. They began to argue that an use was not deviseable, but that it did ensue the nature of the land ; and the same year after this statute was made ; so that this opinion seemeth ever to be, a prelude and forerunner to an act of parliament touching uses ; and if it be so meant now, I like it well : but in the mean time the opinion itself is to be rejected ; and because in the same case of Corbet three reverend judges of the court of common pleas did deliver and publish their opinion, though not directly upon the point adjudged, yet *obiter* as one of the reasons of their judgment, that an use of inheritance could not be limited to cease ; and again, that the limitation of a new use could not be to a stranger ; ruling uses merely according to the ground of possession ; it is worth the labour to examine that learn-

learning. By 3 Hen. VII. you may collect, that if the feoffees had been disseised by the common law, and an ancestor collateral of *cesty que use* had released unto the disseisor, and his warranty had attached upon *cesty que use*; yet the chancellor upon this matter shewed, would have no respect unto it, to compel the feoffees to execute the estate unto the disseisor: for there the case being that *cesty que use* in tail having made an assurance by fine and recovery, and by warranty which descend upon his issue, two of the judges held, that the use is not extinct; and *Bryan* and *Hussey*, that held the contrary, said, that the common law is altered by the new statute; whereby they admit, that by the common law that warranty will not bind and extinct a right of a use, as it will do a right of possession; and the reason is, because the law of collateral garranty is a hard law, and not to be considered in a court of conscience. In 5 Edw. IV. it is said, that if *cesty que use* be attainted, *quære*, who shall have the land, for the lord shall not have the land, so as there the use doth not limitate the possession; and the reason is, because the lord hath a rent by title; for that is nothing to the *Subpæna*, because the feoffee's intent was never to advance the lord, but only his own blood; and therefore the *quære* of the book ariseth what the trust and confidence of the feoffee did tye him to do, as whether he should not sell the land to the use of the feoffee's will, or *in pios usus*? So favourably they took the intent in those days, as you find in 27 H. VI. that if a man had appointed his use to one for life, the remainder in fee to another, and *cesty que use* for life had refused, because the intent appeared not to advance the heir at all, nor him in reversion, presently the feoffee should have the estate for life of him that refused, some ways to the behoof of the feoffor: But to proceed in some better order towards

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the disproof of this opinion of limitation, there be four points wherein we will examine the nature of uses.

1. THE raising of them.
2. THE preserving of them.
3. THE transferring of them.
4. THE extinguishing of them.

expressed

Elekta

1. IN all these four, you shall see apparently that uses stand upon their own reasons, utterly differing from cases of possession. (I would have one case shewed by men learned in the law, where there is a deed; and yet there needs a consideration: as for paroll, the law adjudgeth it too light to give action without consideration; but a deed ever in law imports a consideration, because of the deliberation and ceremony in the confec-
tion of it:) and therefore in 8 *Reginæ* it is solemnly argued, that a deed should raise an use without any other consideration. In the Queen's case a false consideration, if it be of record, will hurt the patent, but want of consideration doth never hurt it; and yet they say that a use is but a nimble and light thing; and now contrariwise it seemeth to be weightier than any thing else: for you cannot weigh it up to raise it, neither by deed, nor deed inrolled, without the weight of a considera-
tion: but you shall never find a reason of this to the world's end, in the law: But it is a reason of chancery, and it is this:

THAT no court of conscience will enforce *douum gratuitum*, though the intent appear never so clearly where it is not executed, or sufficiently passed by law; but if money had been paid, and so a person damnified, or that it was for the establishment of his house, then it is a good matter in the chancery: so again I would see in the law, (a case where a man shall take by a convey-
ance, be it by deed, livery, or word, that is not party to the grant:) I do not say that the delive-
ry must be to him that takes by the deed, for a deed

deed may be delivered to one man to the use of another. Neither do I say that he must be party to the delivery of the deed, for he in the remainder may take though he be not party: but he must be party to the words of the grant: here again the case of the use goeth single, and the reason is, because a conveyance in use is nothing but a publication of the trust; and therefore so as the party trusted be declared, it is not material to whom the publication be: So much for the raising of uses. Now as to the preserving of them.

2. THERE is no case in the common law, wherein notice simply and nakedly is material to make a covin, or *particeps criminis*; and therefore if the heir, which is in by descent, infeoff one which had notice of the disseisin, if he were not a *disseisor de facto*, it is nothing: so in 33 H. VI. if a feoffment be made upon collusion, and feoffee makes a feoffment over upon good consideration, the collusion is discharged, and it is not material if they had notice or no. So as it is put in 14 H. VIII. if a sale be made in a market overt upon good consideration, although it be to one that hath notice that they are stollen goods, yet the property of a stranger is bound; though in the book before remembred 33 Hen. VI. some opine to the contrary, which is clearly no law; so in 31 E. III. if assets descend to the heir, and he alien it upon good consideration, although it be to one that had notice of the debt, or of the warranty, it is good enough. So 25 Aff. p. 1. if a man enter of purpose into my lands, to the end that a stranger, which hath right, should bring his *præcipe* and evict the land, I may enter notwithstanding any such recovery; but if he enter, having notice that the stranger hath right, and the stranger likewise having notice of his entry, yet if it were not upon confederacy or collusion between them, it is nothing; and the reason of these

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cases is, because the common law looketh no farther than to see whether the act were merely *actus fictus in fraudem legis*; and therefore wheresoever it findeth consideration given, it dischargeth the covin.

BUT come now to the case of use, and there it is otherwise, as it is in 14 H. VIII. and 28 H. VIII. and divers books; which prove that if the feoffee sell the land for good consideration to one that hath notice, the purchaser shall stand seized to the ancient use; and the reason is because the chancery looketh farther than the common law, *viz.* to the corrupt conscience of him that will deal in the land, knowing it in equity to be another's; and therefore if there were *Radix Amari-tudinis*, the consideration purgeth it not, but it is at the peril of him that giveth it: so that consideration, or no consideration, is an issue at the common law, but notice, or no notice is an issue in the chancery, and so much for the preserving of uses.

choose in action

3. FOR the transferring of uses there is no case in law whereby an action is transferred, but the *Subpæna* in case of use was always assignable; nay farther, you find twice 27 H. VIII. Fol. 10. Pla. 9. Fol. 30. and Pla. 21. that a right of use may be transferred: for in the former case *Montague* maketh the objection, and saith, that a right of use cannot be given by fine, but to him that hath the possession; *Fitz-Herbert* answereth, yes, well enough; *quare* the reason, saith the book.

AND in the latter case, where *ceſty que use* was infeoffed by the disseisor of the feoffee, and made a feoffment over, *Englefield* doubted whether the second feoffee should have the use. *Fitz-Herbert* said, I marvel you will make a doubt of it, for there is no doubt but the use passeth by the feoffment to the stranger, and therefore this question needeth not to have been made. So the great difficulty in 10 *Reginae Delamer's case*, where the case

case was in effect tenant in tail of an use, the remainder in fee; tenant in tail made a feoffment in fee, tenant, by the statute of 1 R. III. and the feoffee infeoffed him in the remainder of the use, who made it over; and there question being made whether the second feoffee should have the use in remainder, it is said that the second feoffee must needs have the best right in conscience; because the first feoffee claimed nothing but in trust, and the *ceſty que use* cannot claim it against his sale; but the reason is apparent, (as was touched before) that a use in esse was but a thing in action, or in suit to be brought in court of conscience, and where the *subpæna* was to be brought against the feoffee in possession to execute the estate, or against the feoffee out of possession to recontinue the estate, always the *subpæna* might be transferred; for still the action at the common law was not stir'd, but remained in the feoffee; and so no mischief of maintenance or transferring rights.)

AND if a use being but a right may be assigned, and pass'd over to a stranger, *a multo fortiori* it may be limited to a stranger upon the privity of the first conveyance, as shall be handled in another place, and as to what *Glanvile*, justice, said, he could never find by any book, or evidence of antiquity, a contingent use limited over to a stranger: I answer, first, it is no marvel that you find no case before E. IV. his time, of contingent uses, where there be not six of uses in all; and the reason I doubt was, men did choose well whom they trusted, and trust was well observed: and at this day in *Ireland*, where uses be in practice, cases of uses come seldom in question, except it be sometimes upon the alienations of tenants in tail by fine, that the feoffees will not be brought to execute estates, to the dis-inheritance of ancient blood. But for experience, and the conveyance there was nothing more usual in *Obits*, than to will the use of the land to certain persons

persons and their heirs; so long as they shall pay the chantry priests their wages, and in default of payment, to limit the use over to other persons and their heirs; and so in case of forfeiture, through many degrees; and such conveyances are as ancient as R. II. his time.

4. Now for determining and extinguishing of uses, I put the case of collateral garranty before, and to that the notable case of 14 H. VIII. Half-penny's case, where this very point was as in the principal case; for a right out of land, and the land itself in case of possession cannot stand together, but the rent shall be extinct; but there the case is, that the use of the land, and the use of the rent shall stand well enough together; for a rent-charge was granted by the feoffee to one, that had notice of the use, and ruled, that the rent was to the ancient use, and both uses were in *esse simul & semel*: and though Brudenell chief justice urged the ground of possession to be otherwise, yet he was over-ruled by the other three justices, and Brooke said unto him, he thought he argued much for his pleasure; and to conclude, we see that things may be avoided and determined by the ceremonies and acts, like unto those by which they are created and raised; that which passeth by livery ought to be avoided by entry; that which passeth by grant, by claim; that which passeth by way of charge, determineth by way of discharge: and so a use which is raised but by a declaration or limitation, may cease by words of declaration or limitation, as the civil law saith, *in his magis consentaneum est, quam ut iisdem modis res dissolvantur a quibus constituantur*. For the inception and progression of uses, I have for a precedent in them searched other laws, because states and common-wealths have common accidents; and I find in the civil law, that that which cometh nearest in name to the use, is nothing like in matter, which is *usus fructus*:

*in being
at one &
the same
time*

tus : for *usus fructus & dominium* is with them, as with their particular tenancy and inheritance. But that which resembleth the use most is *fidei commissio*, and therefore you shall find in *Justinian*, lib. 2. that they had a form in testaments, to give inheritance to one to the use of another, *Hæredem constituo Caium, rogo autem te, Caie, ut bæreditatem restituas Seio*; and the text of the civilians saith, that for a great time if the heir did not, as he was required, *ceſty que use* had no remedy at all, until about the time of *Augustus Cæsar* there grew in custom a flattering form of trust, for they penned it thus : *Rogo te per salutem Augusti*, or *per fortunam Augusti &c.* Whereupon *Augustus* took the breach of trust to sound in derogation of himself, and made a rescript to the *prætor* to give remedy in such cases ; whereupon within the space of a hundred years, these trusts did spring and speed so fast, as they were forced to have a particular chancellor only for uses, who was called *prætor fidei commissarius*; and not long after the inconvenience of them being found, they resorted unto a remedy much like unto this statute ; for by two decrees of senate, called *senatus-consulatum Trebellianum & Pegasianum*, they made *ceſty que use* to be heir in substance. I have sought likewise, whether there be any thing which maketh with them in our law, and I find that *Periam* chief baron in the argument of *Chudley's case* compareth them to copyholders, and aptly for many respects.

FIRST, because as an use seemeth to be an hereditament in the court of chancery, so the copy-hold seemeth to be an hereditament in the Ls. court.

SECONDLY, this conceit of limitation hath been troublesome in copy-holds as well as in uses ; for it hath been of late days questioned, whether there should be a dower's tenancy by the courtesy, intails, discontinuances, and recoveries of copy-holders,

holders, in the nature of inheritances at the common law, and still the judgments have weighed, that you must have particular customs in copy-holds, as well as particular reasons of conscience in use, and the limitation rejected.

AND thirdly, because they both grew to strength and credit by degrees: for the copy-holder first had no remedy at all against the lord, and were as tenancy at will. Afterwards it grew to have remedy in chancery, and afterwards against their lords by trespass at the common law; and now lastly the law is taken by some, that they have remedy by *ejectione firmæ*, without a special custom of leasing. So no doubt in uses: At the first the chancery made question to give remedy, until uses grew more general, and the chancery more eminent; and then they grew to have remedy in conscience: but they could never obtain any manner of remedy at the common law, neither against the feoffee, nor against strangers; but the remedy against the feoffee was left to the *subpœna*; and the remedy against strangers to the feoffee.

Now for the cases whereupon uses were put in practice, *Coke* in his reading doth say well, that they were produced sometimes for fear, and many times for fraud. But I hold that neither of these cases were so much the reasons of uses, as another reason in the beginning, which was, that lands by the common law of *England* were not testamentary, or deviseable; and of late years since the statute, the case of the conveyance for sparing of purchases, and execution of estates; and now last of all an excess of evil in mens minds, affecting to have the assurance of their estate, and possession to be revocable in their own times, and irrevocable after their own times.

Now for the commencement and proceeding of them, I have considered what it hath been in course of common law, and what it hath been in course

course of statute. For the common law, the conceit of *Shelly* in 24 H. VIII. and of *Pollard* in 27 H. VIII. seemeth to me to be without ground, which was that the use succeeded the tenure ; for after that the statute of *Co-emptores terrarum*, which was made 18 E. I. had taken away the tenure between the feoffor and the feoffee, and left it to the lord *Paramount* : they said that the feoffment being then merely without consideration, should therefore intend an use to the feoffor, which cannot be ; for by that reason, if the feoffment before the statute had been made *tenendum de capitalibus dominis*, as it must be, there should have been an use unto the feoffor before that statute. And again, if a grant had been made of such things as consist not in tenure, as advowsons, rents, villains, and the like, there should have been a use of them, wherein the law was quite contrary ; for after the time that uses grew common, it was nevertheless a great doubt whether things that did lie in grant, did not carry a consideration in themselves because of the deed.

AND therefore I do judge that the intendment of a use to the feoffor, where the feoffment was made without consideration, grew long after, when uses waxed general ; and for this reason, because when feoffments were made, and that it rested doubtful whether it were in use or in purchase, because purchases were things notorious, and uses were things secret, the chancellor thought it more convenient to put the purchaser to prove his consideration, than the feoffor and his heirs to prove the trust ; and so made the intendment towards the use, and put the proof upon the purchaser.

AND therefore as uses were at the common law in reason, for whatsoever is not by statute, nor against law, may be said to be at the common law ; and both the general trust and the special, were things not prohibited by the law, though they

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they were not remedied by the law; so the experience and practice of uses were not ancient; and my reasons why I think so, are these.

FIRST, I cannot find in any evidence before King R. II. his time, the clause *ad opus & usum*, and the very latin of it savoureth of that time; for in ancient time, about *Edw. I.* his time, and before, when lawyers were part civilians, the latin phrase was much purer, as you may see by *Bracton's writing*, and by ancient patents and deeds, and chiefly by the register of writs, which is good latin; wherein this phrase (*ad opus & usum*) and the words (*ad opus*) is a barbarous phrase, and like enough to be the penning of some chaplain that was not much past his grammar, where he had found *opus & usus* coupled together, and that they did govern an ablative case; as they do indeed since this statute, for they take away the land; and put them into a conveyance.

SECONDLY, I find in no private act of attainder, the clause of forfeiture of lands, the words which he hath in possession or in use, until *Ed. IV.*'s reign.

THIRDLY, I find the word (*use*) in no statute until *7 Rich. II. cap. 11.* of proviso's, and in *15 Rich. II. of Mortmaine*.

FOURTHLY, I collect out of *Croke's speech* in *Edw. IV.* where he saith, that by the advice of all the judges, it was thought that the *subpana* did not lie against the heir of the feoffee which was in by law, but *cesty que use* was driven to his bill in parliament, that uses even in that time were but in their infancy; for no doubt but at the first the chancery made difficulty to give remedy at all, and did leave it to the particular conscience of the feoffee: but after the chancery grew absolute, as may appear by the statute of *13 H. VI.* that complainants in chancery should enter into bond to prove their suggestions, which sheweth that the chancery at that time began to

embrace too far, and was used for vexation; yet nevertheless it made scruple to give remedy against the heir being in by act in law, though he were privy; so that it cannot be that uses had been of any great continuance when they made that a question: as for the case of matrimony *prælocuti*, it hath no affinity with use; for wherefover there was remedy at the common law by action, it cannot be intended to be of the nature of a use.

AND for the book commonly vouched of 8 Ass. where *Earl calleth the possession of a conizee* upon a fine levied by consent, an entry in *auter droit*, and 44 of E. III. where there is mention of the feoffors that sued by petition to the King, they be but implications of no moment. So as it appeareth the first practice of uses was about Richard II. his time; and the great multiplying and over-spreading of them was partly during the wars in *France*, which drew most of the nobility to be absent from their possessions; and partly during the time of the trouble and civil war between the two houses about the title of the crown.

Now to conclude the progression of uses in course of statutes, I do note three special points.

1. THAT a use had never any force at all, at the common law, but by statute law.

2. THAT there was never any statute made directly for the benefit of *cesty que use*, as that the descent of an use should toll an entry, or that a release should be good to the person of the profits, or the like; but always for the benefit of strangers and other persons *against cesty que use*, and his feoffees: for though by the statute of *Richard III.* he might alter his feoffees, yet that was not the scope of the statute, but to make good his assurance to other persons, and the other *the ultimate* which came in *ex obliquo*.

3. THAT

3. THAT the special intent unlawful and covenous was the original of uses, though after it induced to the lawful intent general and special; for 30 Edward III. is the first statute I find, wherein mention is made of the taking of profits by one, where the estate in law is in another.

For as to the opinion in 27 Hen. VIII. that in case of the statute of Marlebridge, the feoffees took the profits, it is but a conceit; for the law is this day, that if a man infeoff his eldest son within age, and without consideration, although the profits be taken to the use of the son, yet it is a feoffment within the statute. And for the statute *de religiosis* 7 Ed. I. which prohibits generally that religious persons should not purchase *arte vel ingenio*, yet it maketh no mention of a use, but it faith, *colore donationis termini vel alicujus tituli*, reciting there three forms of conveyances, the gift, the long lease, and feigned recovery; which gift cannot be understood of a gift to a stranger to their use, for that came to be holpen by 15 Richard II. long after. But to proceed, in 5 Edward III. a statute was made for the relief of creditors against such as made covenous gifts of their lands and goods, and conveyed their bodies into sanctuaries, there living high upon others goods; and therefore that statute made their lands liable to their creditors executions in that particular case, if they took the profits. In 1 Richard II. a statute was made for relief of those as had right of action, against those as had removed the tenancy of the *præcipe* from them, sometimes by infeoffing great persons, for maintenance, and sometimes by secret feoffments to others, whereof the defendants could have no notice; and therefore the statute maketh the recovery good in all actions against the first feoffees as they took the profits, and so the defendants bring their action within a year of their

expulsion. In 2 Richard II. Cap. 3. Session 2. an imperfection of the statute of 50 Edward III. was holpen; for whereas the statute took no place, but where the defendant appeared, and so was frustrated, the statute giveth upon proclamation, made at the gate of the place privileged, that the land should be liable without appearance.

IN 7 R. 2. a statute was made for the restraint of aliens, to take any benefices, or dignities ecclesiastical, or farms, or administration to them, without the king's special license, upon pain of the statute of provisors: which being remedied by a former statute, where the alien took it to his own use; it is by that statute remedied, where the alien took it to the use of another, as it is said in the book; though I guess, that if the record were searched, it should be, if any other purchased to the use of an alien, and that the words (or to the use of another) should be (or any other to his use.) In 15 Rich. II. cap. 5. a statute was made for the relief of lords against *Mortmain*, where feoffments were made to the use of corporations, and an ordinance made that for feoffments past, the feoffees should before a day, either purchase license to amortise them, or alien them to some other use, or other feoffments to come, or they should be within the statute of *Mortmain*. In 4 Hen. IV. cap. 7. the statute of 1 Richard II. is enlarged in the limitation of time; for whereas the statute did limit the action to be brought within the year of the feoffment, this statute in case of a disseisin extends the time to the life of the disseisor; and in all other actions, leaves it to the years, from the time of the action grown. In 11 Henry VI. cap. 3. that statute of 4 Henry IV. is declared, because the conceit was upon the statute that in case of disseisin the limitation of the life of the disseisor went only to the assize of *novel disseisin*, and to no other action; and therefore that statute declareth the former law to extend to all

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other actions, grounded upon *novel disseisin*. In 11 Henry VI. cap. 5. a statute was made for relief of him in remainder against particular tenants, for lives, or years, that assigned over their estates, and took the profits, and then committed waste against them; therefore this statute giveth an action of waste, being pernors of the profits. In all this course of statutes no relief is given to purchasers, that come in by the party, but to such as come in by law, as defendants in *præcipes*, whether they be creditors, disseisors, or lessors, and that only in case of *Mortmain*: and note also, that they be all in cases of special covenanted intents, as to defeat executions, tenancy to the *præcipe*, and the statute of *Mortmain*, or provisors. From 11 Henry VI. to 1 R. III. being the space of fifty years, there is a silence of uses in the statute book, which was at that time, when, no question, they were favoured most. In 1 Richard III. cap. 1. cometh the great statute for relief of those that come in by the party, and at that time an use appeareth in his likeness; for there is not a word spoken of taking the profits, to describe a use by, but of claiming to a use; and this statute ordained, that all gifts, feoffments, grants, &c. shall be good against the feoffors, donors and grantors, and all other persons claiming only to their use; so as here the purchaser was fully relieved, and *ceſty que uſe* was *obiter* enabled to change his feoffees; because there were no words in the statute of feoffments, grants, &c. upon good consideration; but generally in Henry VII's time, new statutes were made for further help and remedy to those that came in by act in law; as first 1 Henry VII. cap. 1. a *formedon* is given without limitation of time against *ceſty que uſe*; and *obiter*, because they make him a tenant, they give him advantage of a tenant, as of age, and voucher: *quære 4 Hen. VII. 17.* the wardship is given to the lord of the heir of *ceſty que uſe*, dying, and

and no will declared; is given to the lord, as if he had died seised in demesne, and action of waste given to the heir against the guardian, and damages, if the lord were barr'd in his writ of ward; and relief is likewise given unto the lord, if the heir holding the knight-service be of full age. In 19 Hen. VII. cap. 15. there is relief given in three cases, first to the creditors upon matters of record, as upon recognizance, statute, or judgment, whereof the two former were not aided at all by any statute; and the last was aided by a statute of 50 E. III. and 2 R. II. only in case of sanctuary men. Secondly, to the lords in socage for their relief, and heriots upon death, which was omitted in the 4 Hen. VII. and lastly to the lords of villains, upon a purchase of their villains in use. In 23 Henry VIII. cap. 10. a further remedy was given in a case, like unto the case of *Mortmain*; for in the statute of 15 Richard II. remedy was given where the use came *ad manum mortuam*, which was when it came to some corporation: now when uses were limited to a thing, act, or work, and to a body, as to the reparation of a church, or an abbot, or to a guild, or fraternities, as are only in reputation, but not incorporate: as to parishes, or such guilds or fraternities as are only in reputation, but not incorporate; that case was omitted, which by this statute is remedied, not by way of giving entry unto the lord, but by way of making the use utterly void; neither doth the statute express to whose benefit the use shall be made void, either the feoffor, or feoffee, but leaveth it to law, and addeth a *proviso*, that uses may be limited twenty years from the gift, and no longer.

THIS is the whole course of statute law before this statute, touching uses. Thus have I set forth unto you the nature and definition of an use, the differences and trust of an use, and the parts and qualities of it; and by what rules and

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learnings uses shall be guided and ordered: by a precedent of them in our laws, the causes of the springing and spreading of uses, the continuance of them, and the proceedings that they have had both in common law and statute law; whereby it may appear, that a use is no more but a general trust, when any one will trust the conscience of another better than his own estate and possession, which is an accident or event of human society, which hath been, and will be in all laws, and therefore was at the common law, which is common reason.) *Fitz-Herbert* saith in the 14 H. VIII. common reason is common law, and not conscience; but common reason doth define that uses should be remedied in conscience, and not in courts of law, and ordered by rules in conscience, and not by streight rules of law, for the common law hath a kind of a rule and survey over the chancery, to determine what belongs to the chancery. And therefore we may truly conclude, that the force and strength that a use had or hath in conscience, is by common law, and the force that it had or hath by common law is only by statutes.

Now followeth in time and matter, the consideration of this statute, which is of principal labour; for those former considerations which we have handled serve but for introduction.

THIS statute, as it is the statute which of all others hath the greatest power and operation over the heritages of the realm, so howsoever it hath been by the humour of the time perverted in exposition, yet in itself is most perfectly and exactly conceived and penned of any law in the book. 'Tis induced with the most declaring and persuading preamble, 'tis consisting and standing upon the wifest and fitteſt ordinances, and qualified with the most foreseeing and circumspect savings and provisoēs: and laſtly 'tis the best ponder'd in all the words and clauses of it of any statute

Statute that I find ; but before I come to the statute itself, I will note unto you three matters of circumstance.

1. THE time of the statute : 2. The title of it :
3. The president or pattern of it.

FOR the time of it was in 27 Hen. VIII. when the King was in full peace, and a wealthy and flourishing estate, in which nature of time men are most careful of their possessions; as well because purchasers are most stirring : as again, because the purchaser when he is full, is no less careful of his assurance to his children, and of disposing that which he hath gotten, than he was of his bargain for compassing thereof.

ABOUT that time the realm likewise began to be enfranchised from the tributes of Rome, and the possessions that had been in Montmain began to stir abroad; for this year was the suppression of the smaller houses of religion, all tending to plenty, and purchasing : and this statute came in consort with divers excellent statutes, made for the kingdom in the same parliament; as the reduction of Wales to a more civil government, the re-edifying of diverse cities and towns, the suppressing of depopulation and inclosures.

FOR the title, it hath one title in the roll, and another in course of pleading. The title in the roll is no solemn title, but an act entitled, an act expressing an order for uses and wills; the title in course of pleading is, *statutum de usibus, in possessionem transferendis*: wherein Walsly justice noted well 4 Regiae, that if a man look to the working of the statute, he would think that it should be turned the other way, *de possessionibus ad usus transferendis*; for that is the course of the statute, to bring possession to the use. But the title is framed not according to the work of the statute, but according to the scope and intention of the statute, *nam quod primum est in intentione, ultimum est in operatione*. The intention

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of the statute by carrying the possession to the use, is to turn the use to a possession; for the words are not *de possessionibus ad usus transferendis*; and as the grammarian saith, *præpositio (ad) denotat notam actionis, sed præpositio (in) cum accusativo denotat notam alterationis*: and therefore *Kingsmill* justice in the same case saith, that the meaning of the statute was, to make a transubstantiation of the use into a possession. But it is to be noted, that titles of acts of parliament severally came in but in the 5 H. VIII. for before that time there was but one title of all the acts made in one parliament; and that was no title nejther, but a general preface of the good intent of the King, tho' now it is parcel of the record.

FOR the president of this statute upon which it is drawn, I do find by the first *Richard III.* whereupon you may see the very mould whereon this statute was made, that the said King having been infeoffed (before he usurped) to uses, as it was ordained that the land whereof he was jointly infeoffed as if he had not been named; and where he was solely infeoffed, it should be in *cesty que use*, in estate, as he had the use.

Now to come to the statute itself, the statute consisteth as other laws do upon a preamble, the body of the law, and certain savings, and provisoies. The preamble setteth forth the inconveniences, the body of the law giveth the remedy, and the savings and provisoies take away the inconveniences of the remedy. For new laws are like the apothecaries druggs, though they remedy the disease, yet they trouble the body; and therefore they use to correct with spices; so it is not possible to find a remedy for any mischief in the common-wealth, but it will beget some new mischief; and therefore they spice their laws with provisoies to correct and qualify them.

THE preamble of the law was justly commend-ed by *Popbam* chief justice in 36 *Reginae*, where he

he saith, that there is little need to search and collect out of cases, before this statute, what the mischief was which the scope of the statute was to redress; because there is a shorter way offered us, by the sufficiency and fulness of the preamble, and therefore it is good to consider it, and ponder it thoroughly.

THE preamble hath three parts.

FIRST a recital of the principal inconveniences, which is the root of all the rest.

SECONDLY, an enumeration of divers particular inconveniences, as branches of the former.

THIRDLY, a taste or brief note of the remedy that the statute meaneth to apply. The principal inconvenience which is *radix omnium malorum*, is the directing from the grounds and principles of the common law, by inventing a mean to transfer lands and inheritances without any solemnity, or act notorious: so as the whole statute is to be expounded strongly towards the extinguishment of all conveyances, whereby the freehold or inheritance may pass without any new confessions of deeds, executions of estate or entries, except it be where the estate is of privity and dependance one towards the other, in which cases *mutatis mutandis*, they might pass by the rules of the common law.

THE particular inconveniences by the law rehearsed may be reduced into four heads.

1. FIRST, that these conveyances in use are weak for consideration.

2. SECONDLY, that they are obscure and doubtful for trial.

3. THIRDLY, that they are dangerous for want of notice and publication.

4. FOURTHLY, that they are exempted from all such titles as the law subjecteth possessions unto.

THE first inconvenience lighteth upon heirs.

THE second upon jurors and witnesses,

THE third upon purchasers.

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*in his
last will*

THE fourth upon such as come in by gift in law.

ALL which are persons that the law doth principally respect and favour.

FOR the first of these are three impediments (to the judgment of man) in disposing justly and advisedly of his estate. —

FIRST, trouble of mind.

SECONDLY, want of time.

THIRDLY, of wise and faithful counsel about him.

1. AND all these three the statute did find to be in the disposition of an use by will, whereof followed the unjust disinherison of heirs. Now the favour of law unto heirs appeareth in many parts of the law ; as the law of descent privilegeth the possession of the heir, against the entry of him that hath right by the law : no man shall warrant against his heir, except he warrant against himself, and divers other cases too long to stand upon : and we see the ancient law in *Glanvill's* time was, that the ancestor could not disinherit his heir by grant, or other act executed in time of sickness ; neither could he alien land which had descended unto him, except it were for consideration of money or service, but not to advance any younger brother without the consent of the heir.

2. FOR trials, / no law ever took a straiter course that evidence should not be perplexed, nor juries inveigled, than the common law of *England* ; as on the other side, never law took a more precise and strait course with juries, that they should give a direct verdict.) For whereas in a manner all laws do give the tryers, or jurors (which in all other laws are called judges *de facto*) a liberty to give *non liquet*, that is, to give no verdict at all, and so the case to stand abated ; our law enforceth them to a direct verdict, general or special ; and whereas other laws, accept of plurality of voices to make a verdict, our law enforceth them all to agree in one ; and whereas other laws leave them

them to their own time, and ease, and to part, and to meet again ; our law doth duress and imprison them in the hardest manner, without light or comfort, until they be agreed, in consideration of straitnes and coercion : it is consonant, that the law do require in all matters brought to issue, that there be full proof and evidence ; and therefore if the matter in itself be of that surety as in simple contracts, which are made by parol, without writing, it alloweth wager of law.

In issue upon the mere right (which is a thing hardly to discern) it alloweth wager of battail to spare jurors, if time have wore out the marks and badges of truth : from time to time there have been statutes of limitation, where you shall find this mischief of perjuries often recited ; and lastly, which is the matter in hand, all inheritances could not pass but by acts overt and noto-rious, as by deeds, livery, and records.

3. For purchasers (*bona fide*) it may appear that they were ever favoured in our law, as first by the great favour of warranties, which were ever for the help of purchasers : as where by the law in 5 Edw. III.'s time, the disseisor could not enter upon the feoffee in regard of the warranty ; so again the collateral garranty, which otherwise as a hard law, grew in doubt only upon favour of purchasers ; so was the binding of fines at the common law, the invention and practice of recoveries, to defeat the statute of intails, and many more grounds and learnings are to be found, which respect the quiet of the possession of purchasers. And therefore though the statute of 1 Rich. III. had provided for the purchaser in some sort, by enabling the acts and conveyances of *cesty que use* ; yet nevertheless, the statute did not at all disable the acts or charges of the feoffees ; and so as *Walmystry* justice said 42 Reginæ, they played at double hand, for *cesty que nſc* might sell,

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*Counties
Palatines
Baronies
&c -*
sell, and the feoffee might sell, which was a very great uncertainty to the purchaser.

4. For the fourth inconvenience towards those that come in by law, conveyances in uses were like privileged places or liberties; for as there the law doth not run, so upon such conveyances the law could take no hold, but they were exempted from all titles in law. No man is so absolute owner of his possessions, but that the wisdom of the law doth reserve certain titles unto others; and such persons come not in by the pleasure and disposition of the party, but by the justice and consideration of law, and therefore of all others they are most favour'd: and also they are principally three.

1. THE King and lords who lost the benefit of attainders, fines for alienations, escheats, aids, heriots, reliefs, &c.

2. THE defendants in *præcipes* either real or personal, for debt and damages, who lost the benefit of their recoveries and executions.

3. TENANTS in dower, and by the courtesy, who lost their estates and tithes.

1. FIRST for the King: no law doth endow the King or Sovereign with more prerogatives or privileges: for his person is privileged from suits and actions, his possessions from interruption and disturbance, his right from limitation of time, his patents and gifts from all deceits and false suggestions. Next the King is the lord, whose duties and rights the law doth much favour, because the law supposeth the land did originally come from him; for until the statute of *Quia emptores terrarum*, the lord was not forced to destract or dismember his signiory or service. So until 15 H. VII. the law was taken, that the lord, upon his title of wardship, should be put to a conizee of a statute, or a termor; so again we see, that the statute of *Mortmain* was made to preserve the lord's

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lord's escheats and wards ; the tenant in dower is so much favoured, as that it is the common by-word in the law, that the law favoureth three things.

1. LIFE. 2. Liberty. 3. Dower.

So in case of voucher, the feme shall not be delayed, but shall recover against the heir incontinent ; so likewise of tenant by curtesy it is called tenancy by the law of *England*, and therefore specially favoured, as a proper conceit and invention of our law ; so as again the law doth favour such as have ancient rights, and therefore it telleth us it is commonly said that a right cannot die : and that ground of law, that a freehold cannot be in suspence, sheweth it well, insomuch that the law will rather give the land to the first comer, which we call an occupant, than want a tenant to a defendant's action.

AND again the other ancient ground of law of remitter sheweth that where the tenant faileth without folly in the defendant, the law executeth the ancient right. To conclude therefore this point, when this practice of feoffments to use did prejudice and damnify all those persons that the ancient common law favour'd ; and did absolutely cross the wisdom of the law : to have conveyances considerate and not odious, and to have trial thereupon clear and not inveighed, it is no marvail that the statute concludeth, that their subtle imaginations and abuses tended to the utter subversion of the ancient common laws of this realm.

THE third part of the preamble giveth a touch of the remedy which the statute intendeth to minister, consisting in two parts.

FIRST, the expiration of feoffments.

SECONDLY, the taking away of the hurt, damage, and deceit of the uses, out of which have been gathered two extremities of opinions.

THE first opinion is, that the intention of the statute was to discontinue and banish all conveyances

*tenant to
the Poal
eipe.*

ances in use; grounding themselves upon the words, that the statute doth not speak of the extinguishment or extirpation of the use, *viz.* by an unity of possession, but of an extinguishment or extirpation of the feoffment, &c. which is the conveyance itself.)

SECONDLY, out of the words (abuse and errors) heretofore used and accustomed, as if uses had not been at the common law, but had been only an erroneous device or practice.

To both which I answer.

To the former, that the extirpation which the statute meant was plain, to be of the feoffee's estate, and not to the form of conveyances.

To the latter I say, that for the word (abuse) that may be an abuse of the law which is not against law, as the taking long leases at this day of land *in capite* to defraud wardships, is an abuse of the law, which is not against law: and by the word (errors) the statute meant by it, not a mistaking of the law, but wandring or going astray, or digressing from the ancient practice of the law into a by-course: as when we say (*erravimus cum patribus juris*) it is not meant of ignorance only, but of perversity. But to prove that the statute meant not to suppress the form of conveyances, there be three reasons which are not answerable.

THE first is, that the statute in the very branch thereof hath words, *de futuro* (that are seised, or hereafter shall be seised:) and whereas it may be said that these words were put in, in regard of uses suspended by disseisins, and so no present seisin to the use, until a regress of the feoffees; that intendment is very particular, for commonly such cases are brought in by provisoies, or special branches, and not intermixed in the body of a statute; and it had been easy for the statute to have said, or hereafter shall be seised upon any feoffment, &c. heretofore had or made.

THE second reason is upon the words of the statute of enrolments, which saith, that no hereditaments shall pass, &c. or any use thereof, &c. whereby it is manifest, that the statute meant to leave the form of conveyance with the addition of a farther ceremony.

THE third reason I make is out of the words of the proviso, where it is said, that no primer seisin, livery, no fine, nor alienation, shall be taken for any estate executed by force of the statute of 27. before the first of *May 1536*, but they shall be paid for uses made and executed in possession for the time after; where the word (made) directly goeth to conveyances in use made after the statute, and can have no other understanding; for the words (executed in possession) would have served for the case of regress: and lastly, which is more than all, if they have had any such intent, the case being so general and so plain, they would have had words express, that every limitation of use made after the statute should have been void; and this was the exposition, as tradition goeth, that a reader of *Grays-Inn*, which read soon after the statute, was in trouble for, and worthily, who, as I suppose, was *Boy*, whose reading I could never see; but I do now insist upon it, because now again some in an immoderate invective against uses, do relapse to the same opinion.

THE second opinion which I called a contrary extremity is, that the statute meant only to remedy the mischiefs in the preamble, recited as they grew by reason of divided use; and although the like mischief may grow upon the contingent uses, yet the statute had no foresight of them at that time, and so it was merely a new case not comprised. Whereunto I answer, that it is the work of the statute to execute the divided use; and therefore to make an use void by this statute which was good before, though it doth participate of the mischief recited in the statute, were to make

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make a law upon a preamble without a purview, which were grossly absurd. But upon the question what uses are executed, and what not ; and whether out of possessions of a disseisor, or other possessions out of privity or not, there you shall guide your exposition according to the preamble ; as shall be handled in my next day's discourse ; and so much touching the preamble of this law.

For the body of the law, I would wish all readers that expound statutes to do as scholars are willed to do : that is, first to seek out the principal verb ; that is, to note and single out the material words whereupon the statute is framed ; for there are in every statute certain words, which are as veins where the life and blood of the statute cometh, and where all doubts do arise ; and the rest are *literæ mortuæ* fulfilling words.

THE body of the statute consisteth upon two parts. (*Elements*)

FIRST, a supposition, or case put, as *Anderson* 36 *Reginæ* calleth it.

SECONDLY, a purview or ordinance thereupon.

THE cases of the statute are three, and every one hath his purview.

THE general case.

THE case of co-feoffees to the use of some of them.

AND the general case of feoffees to the use or persons of rents or profits.

THE general case is built upon eight material words.

FOUR on the part of the feoffees.

THREE on the part of *cesty que use*, and one common to them both.

THE first material word on the part of the feoffees is the word (person.) This excludes all alliances ; for there can be no trust repos'd but in a person certain : it excludes again all corporations ; for they are equalled to a use certain : for note on the part of the feoffor-over the statute insists upon

upon the word (person,) and in the part of *ceſty que uſe*, that added body politick.

THE second word material, is the word (*ſeiz'd:*) this excludes chattels. The reason is, that the statute meant to remit the common law, and not but that the chattels might ever pass by testament or by parol; therefore the uſe did not pervert them. It excludes rights, for it is against the rules of the common law to grant, or transfer rights; and therefore the statute would execute them.

THIRDLY, it excludes contingent uſes, because the ſeifin cannot be but to a fee-simple of a uſe; and when that is limited, the ſeifin of the feoffee is spent; for Littleton tells us, that there are but two ſeifins, one in *Dominio ut de feodo*, the other *ut de feodo & jure*; and the feoffee by the common law could execute but the fee-simple to uſes present, and not post uſes; and therefore the statute meant not to execute them.

THE third material word is (*hereafter*) that bringeth in again conveyances made after the statute; it brings in again conveyances made before, and diſturb'd by diſfeiſin, and recontinued after; for it is not ſaid infeoffed to uſe hereafter ſeiz'd.

THE fourth word is (*hereditament*) which is to be understood of those things whereof an inheritance is *in eſſe*: for if I grant a rent-charge *de novo* for life to a uſe, this is good enough; yet there is no inheritance in being of this rent: this word likewiſe excludes annuities and uſes themſelves; so that a uſe cannot be to a uſe.

THE first word on the part of *ceſty que uſe*, is the word (*uſe*, confidence or trust) whereby it is plain that the statute meant to remedy the matter, and not words; and in all the clauses it still carrieth the words.

THE second word is the word (person) again which excludeth all alliances: it excludeth also all contingent uſes which are not to bodies, lively and

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and natural, as the building of a church, the making of a bridge ; but here (as noted before) it is ever coupled with body politick.

THE third word is the word (*other*;) for the statute meant not to cross the common law. Now at this time uses were grown to such a familiarity, as men could not think of possession, but in course of use ; and so every man was seised to his own use, as well as to the use of others ; therefore because statutes would not stir nor turmoil possession settled at the common law, it putteth in precisely this word (*other*:) meaning the divided use, and not the conjoined use ; and this causeth the clause of joint feoffees to follow in a branch by itself ; for else that case had been doubtful upon this word (*other*.)

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obliged

THE words that are common to both, are words expressing the conveyance whereby the use ariseth, of which words, those that breed any question are (*agreement, will, otherwise*) whereby some have inferred that uses might be raised by agreement parol, so there were a consideration of money, or other matter valuable ; for it is expressed in the words before (*bargains, sale, and contract*) but of blood, or kindred ; the error of which collection appeareth in the word immediately following (*viz. will*) whereby they might as well include, that a man seised of land might raise an use by will, especially to any of his sons or kindred, where there is a real consideration ; and by that reason mean, betwixt this statute and the statute of 32 of wills, lands were deviseable, especially to any man's kindred, which was clearly otherwise ; and therefore those words were put in, not in regard of uses raised by those conveyances, or without, or likewise by will, might be transferred ; and there was a person seised to a use, by force of that agreement or will (*viz.*) to the use of the assignee ; and for the word (*otherwise*) it should by the generality of the word include a disseisin

to a use. But the whole scope of the statute crosseth that which was to execute such uses, as were confidences and trust, which could not be in case of disseisin; for if there were a commandment precedent, then the land was vested in *cesty que use* upon the entry; and if the disseisin were of the disseisor's own head, then no trust; and thus much for the case of supposition of this statute; here follow the ordinance and purview therupon.

THE purview hath two parts, the first *operatio statuti*, the effect that the statute worketh: and there is *modus operandi*, a fiction, or explanation how the statute doth work that effect. The effect is, that *cesty que use* shall be in possession of like estate as he hath in the use; the fiction quomodo is, that the statute will have the possession of *cesty que use*, as a new body compounded of the matter and form; and that the feoffees shall give matter and substance, and the use shall give form and quality; the material words in the first part of the purview are four.

THE first words are remainder and reverter, the statute having spoken before of uses in fee-simple, in tail, for life, or years, addeth, or otherwise (in remainder, reverter:) whereby it is manifest, that the first words are to be understood of uses in possession; for there are two substantial and essential differences of estates, the one limiting the times, (for all estates are but times of their continuances) the former maketh little difference of fee-simple, fee-tail for life or years, and the other maketh difference of possession as remainder: all other differences of estate are but accidents, as shall be said hereafter: these two the statute meant to take hold of, and at the words, remainder and reverter it stops: it adds not words, (right, title, or possibility) nor it hath not general words (or otherwise); it is most plain, that the statute meant to execute no inferior uses to remainder or reverter; that is to say, no possibility or contingences,

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but estates, only such as the feoffees might have executed by conscience made.) Note also, the very letter of the statute doth take notice of a difference between an use in remainder and an use in reverter; which though it cannot properly be so called, because it doth not depend upon particular estates, as remainders do, neither did then before the statute draw any tenures as reversions do; yet the statute intends that there is a difference when the particular use and the use limited upon the particular use are both new uses; in which case it is a use in remainder; and where the particular use is a new use, and the remnant of the use is the old use, in which case it is a use in reverter.

THE next material word is (from henceforth) which doth exclude all conceit of relation that *ceſty que uſe* shall not come in, as from the time of the first feoffments to use; as *Brudnell's* conceit was in 14 Hen. VIII. That is, the feoffor had granted a rent-charge, and *ceſty que uſe* had made a feoffment in fee, by the statute of 1 Richard III. the feoffor should have held it discharged, because the act of *ceſty que uſe* shall put the feoffor in, as if *ceſty que uſe* had been seized in from the time of the first use limited; and therefore the statute doth take away all such ambiguities, and expresseth that *ceſty que uſe* shall be in possession from henceforth; that is, from the time of the parliament for uses then in being, and from the time of the execution for uses limited after the parliament.

THE third material words are (lawful seisin, state and possession) not a possession in law only, but a seisin in tail; not a title to enter into the land, but an actual estate.

THE fourth words are of and in such estates as they had in the use; that is to say, little estates, fee-simple, fee-tail, for life, for years at will, in possession, and reversion, which are the substantial differences of estates, as was said before; but both their latter clauses are more fully per-

perfected and expounded by the branch of the fiction of the statute which follows.

THIS branch of fiction hath three material words or clauses: the first material clause is, that the estate, right, title, and possession that was in such person, &c. shall be in cesty que use; for that the matter and substance of the estate of cesty que use is the estate of the feoffee, and more he cannot have; so as if the use were limited to cesty que use and his heirs; and the estate out of which it was limited was but an estate for life, cesty que use can have no inheritance: so if when the statute came the heir of the feoffee had not entred after the death of his ancestor, but had only a possession in law, cesty que use in that case should not bring an assize before entry, because the heir of the feoffee could not; so that the matter whereupon the use must work is the feoffee's estate. But note here: whereas before when the statute speaks of the uses, it spake only of uses in possession, remainder, and reverter, but not in title or right. Now when the statute speaks what shall be taken from the feoffee, it speaks of title and right; so that the statute takes more from the feoffee than it executes presently in case, where there are uses in contingency which are but titles.

THE second word is (clearly) which seems properly and directly to meet with the conceit of *Scintilla Furis*, as well as the words in the preamble of extirpating and extinguishing such feoffments, so is their estates as clearly extinct.

THE third material clause is (after such quality, manners, form and condition as they had in the use); so as now as the feoffee's estate gives matter, so the use gives form: and as in the first clause the use was endowed with the possession in points of estate, so there it is endowed with the possession in all accidents and circumstances of estate; wherein first note, that it is gross and absurd to expound the form of the use any whit to destroy the sub-

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stance of the estate as to make a doubt, (because the use gave no dower or tenancy by the courtesy) that therefore the possession when it is transferred would do so likewise: no, but the statute meant such quality, manner, form and condition, as it is not repugnant to the corporal presence and possession of the estate.

NEXT for the word (condition) I do not hold it to be put in for uses upon condition, though it be also comprised within the general words; but because I would have things stood upon learnedly, and according to the true sense, I hold it but for an explaining, or word of the effect; as it is in the statute of 26 of treasons, where it is said, that the offender shall be attainted of the overt fact by men of their condition (in this place;) that is to say, of their degree, or sort: and so the word condition in this place is no more, but in like quality, manner, form and degree or sort; so as all these words amount but to (*modo & forma*.) Hence therefore all circumstances of estate are comprehended, as sole seisin, or jointly seisin, by interties, or by moieties, a circumstance of estate to have age as coming in by descent, or not age as purchaser, or circumstance of estate descendable to the heir of the part of the father, or of the part of the mother. A circumstance of estate conditional or absolute, remitted or not remitted, with a condition of inter-marriage, or without, all these are accidents and circumstances of estate, in all which the possession shall ensue the nature and quality of the use: and thus much of the first case which is the general case.

THE second case of the joint feoffees needs no exposition; for it pursueth the penning of the general case: only this I will note, that although it had been omitted, yet the law upon the first case would have been taken as the case provided; so that it is rather an explanation than an addition: for turn that case the other way, that one were

were infeoffed to the use of himself, I hold the law to be, that in the former case they shall be seised jointly; and so in the latter case *cesto que use* shall be seised solely: for the word (other) it shall be qualified by the construction of cases, as shall appear when I come to my division. But because this case of co-feoffees to the use of one of them was a general case in the realm, therefore they foresaw it, oppress'd it precisely, and pass'd over the case *e converso*, which was but an especial case: and they were loth to bring in this case, by inserting the word only into the first case, to have penned it to the use only of other persons; for they had experience what doubt the word (only) bred upon the statute of 1 R. III. after this third case, and before the third case of rents comes in the second saving; and the reason of it is worth the noting, why the savings are interlaced before the third case; the reason of it is, because the third case needeth no saving, and the first two cases did need savings; and that is the reason of that again.

IT is a general ground, that where an act of parliament is donor, if it be penned with an (ac si) it is not a saving, for it is a special gift, and not a general gift, which includes all rights; and therefore in 11 Henry VII. where upon the alienation of women, the statute intitles the heir of him in remainder to enter, you find never a stranger, because the statute gives entry not (simpliciter) but within an (ac si); as if no alienation had been made, or if the feme had been naturally dead. Strangers that had right might have entred; and therefore no saving needs. So in the statute of 32 of leases, the statute enacts, that the leases shall be good and effectual in law, as if the lessor had been seised of a good and perfect estate in fee-simple; and therefore you find no saving in the statute; and so likewise of divers other statutes, where the statute doth make

a gift or title good, specially against certain persons, there needs no saving, except it be to exempt some of those persons; as in the statute of I R. III. Now to apply this to the case of rents, which is penned with an (*ac si*) (*viz.*) as if a sufficient grant, or lawful conveyance had been made, or executed by such as were seised; why if such a grant of a rent had been made, one that had an ancient right might have entred and have avoided the charge; and therefore no saving needeth; but the second first cases are not penned with an (*ac si*) but absolute, that *cesty que use* shall be adjudged in estate and possession, which is a judgment of parliament stronger than any fine, to bind all rights; nay it hath farther words (*viz.*) in lawful estate and possession, which maketh it stronger than any in the first clause; for if the words only had stood upon the second clause, (*viz.*) that the estate of the feoffee should be in *cesty que use*, then perhaps the gift should have been special, and so the saving superfluous: and this note is material in regard of the great question, whether the feoffees may make any regress; which opinion (I mean that no regress is left unto them) is principally to be argued out of the saving; as shall be now declared: for the savings are two in number; the first saveth all strangers rights, with an exception of the feoffees; the second is a saving out of the exception of the first saving, (*viz.*) of the feoffees in case where they claim to their own proper use: it had been easy in the first saving out of the statute (other than such persons as are seized, or hereafter should be seised to any use) to have added to these words (executed by this statute;) or in the second saving to have added unto the words (claiming to their proper use) these words (or to the use of any other, and executed by this statute:) but the regress of the feoffee is shut out between the two savings; for it is the right of a person

person claiming to an use, and not unto his own proper use; but it is to be added, that the first saving is not to be understood as the letter implieth, that feoffees to use shall be barr'd of their regrefs, in case that it be of another feoffment than that whereupon the statute hath wrought, but upon the same feoffment; as if the feoffee before the statute had been disseised, and the disseised had made a feoffment in fee to I. D. his use, and then the statute came: this executeth the use of the second feoffment; but the first feoffees may make a regref, and they yet claim to an use, but not by that feoffment upon which the statute hath wrought.

NOW followeth the third case of the statute touching execution of rents; wherein the material words are four:

FIRST, whereas divers persons are seised, which hath bred a doubt that it should only go to rents in use, at the time of the statute; but it is explained in the clause following (*viz.*) as if a grant had been made to them by such as are or shall be seised.

THE second word is (*profit*) for in the putting of the case, the statute speaketh of a rent; but after in the purview is added these words (*or profit.*)

THE third word is (*ac si*) (S) that they shall have the (S) as if a sufficient grant or lawful conveyance had been made and executed unto them.

THE fourth words are the words of liberty and remedies attending upon such rent (S) that he shall distrain, &c. and have such fairs, entries, and remedies, relying again with an (*ac si*) as if the grant had been made with such collateral penalties and advantages.

Now for the provisoes; the makers of this law did so abound with policy and discerning, as they

did not only foresee such mischiefs as were incident to this new law immediately, but likewise such as were consequent in a remote degree; and therefore besides the express provisoës, they did add three new provisoës which are in themselves substractive laws; for foreseeing that by the execution of uses, wills formerly made should be overthrown: They made an ordinance for wills. Foreseeing likewise, that by execution of uses, women should be doubly advanced: they made an ordinance for dowers and jointures. Foreseeing again, that the execution of uses would make *franktenement* pass by contracts paroll, they made an ordinance for inrollments of bargains and sales. The two former they inserted into this law, and the third they distinguished into a law apart, but without any preamble, as may appear, being but a provisoë to this statute: Besides all these provisional laws; and besides five provisoës, whereof three attend upon the law of jointure, and two born in *Wales*, which are not material to the purpose in hand. There are six provisoës which are natural and true members and limbs of the statute, whereof four concern the part of *cesty que use*, and two concern the part of the feoffees: The four, which concern the part of *cesty que use*, tend all to save him from prejudice by the execution of the estate.

THE first saveth him from the extinguishment of any statute or recognizance; as if a man had an extent of a hundred acres, and an use of the inheritance of one. Now the statute executing the possession to that one, would have extinguish'd his extent being intire in all the rest: or as if the commissioner of a statute having ten acres liable to the statute, had made a feoffment in fee to a stranger of two, and after had made a feoffment in fee to the use of the conizee and his heirs. And upon this provisoë there arise three questions: First, whether this provisoë were not super-

superfluous, in regard that *cesty que use* was comprehended in the general saying, though the feoffees be excluded?

SECONDLY, whether this proviso doth save statutes or executions, with an apportionment or entire?

THIRDLY, because it is penned indefinitely in point of time, whether it shall go to uses limited after the statute, as well as to those that were in being all the time of the statute, which doubt is rather enforced by this reason, because there was for uses at the time of the statute; for that the execution of the statute might be waved: but both possession and use, since the statute, may be waved.

THE second proviso saveth *cesty que use* from the charge of *primer seisin*, *liveries*, *ouster le maines*, and such other duties to the King, with an express limitation of time: that he should be discharged for the time past, and charged for the time to come to the King, *viz. May 1536.* to be *communis terminus*.

THE third proviso doth the like for fines, reliefs, and heriots discharging them for the time past, and speaking nothing of the time to come.

THE fourth proviso giveth to *cesty que use* all collateral benefits of vouchers, aids priors, actions of waste, trespasses, conditions broken, and which the feoffees might have had; and this is expressly limited for estates executed before *1 May 1536.* And this proviso giveth occasion to intend that none of these benefits would have been carried to *cesty que use*, by the general words in the body of the law, (S.) that the feoffees estate, right, title, and possession, &c.

FOR the two provisos on the part of the tenant, they both concern the saving of strangers from prejudice, &c.

THE first saves actions depending against the feoffees, that they shall not abate.

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THE second saves wardships, liveries, and *ouster le maines*, whereof title was vested in regard of the heir of the feoffee, and this in case of the King only.

What persons may be seised to an use, and what not.

What persons may be cestry que use, and what not.

What persons may declare an use, and what not.

THOUGH I have opened the statute in order of words, yet I will make my division in order of matter, *viz.*

1. THE raising of uses.
2. THE interruption of uses.
3. THE executing of uses.

AGAIN, the raising of uses doth easily divide itself into three parts.

THE persons that are actors to the conveyance to use.

THE use itself.

THE form of the conveyance.

THEN it is first to be seen what persons may be seised to an use, and what not; and what persons may be *cestry que use*, and what not.

THE King cannot be seised to an use; no not where he taketh in his natural body, and to some purpose as a common person; and therefore if land be given to the King, and *I. D. per terme de lour vics*, this use is void for a moiety.

LIKE law is, if the King be seized of land in the right of his duchy of *Lancaster*, and covenanteth by his letters patent under the duchy seal to stand seised to the use of his son, nothing passeth.

LIKE law, if King *R. III.* who was feoffor to divers uses before he took upon him the crown, had after he was King by his letters patent granted the land over, the uses had not been renewed.

THE

THE Queen (speaking not of an imperial Queen but by marriage) cannot be seised to an use, though she be a body enabled to grant and purchase, without the King: yet in regard of the government and interest the king hath in her possession, she cannot be seised to an use.

A CORPORATION cannot be seised to an use, because their capacity is to a use certain; again, because they cannot execute an estate without doing wrong to their corporation or founder; but chiefly because of the letter of this statute which (in any clause when it speaketh of the feoffee) resteth only upon the word (person,) but when it speaketh of *cesty que use*, it addeth person or body politick.

If a bishop bargain or sell lands whereof he is seised in the right of his fee, this is good during his life; otherwise it is where a bishop is infeoffed to him and his successors, to the use of *I. D.* and his heirs, that is not good, no not for the bishop's life, but the use is merely void.

CONTRARY law of tenant in tail; for if I give land in tail by deed since the statute to *A.* to the use of *B.* and his heirs; *B.* hath a fee-simple determinable upon the death of *A.* without issue. And like law, though doubtful before the statute, was, for the chief reason which bred the doubt before the statute, was because tenant in tail could not execute an estate without wrong; but that since the statute is quite taken away, because the statute saveth no right of intail, as the statute of *i R. III.* did; and that reason likewise might have been answered before the statute, in regard of the common recovery.

A FEME covert and an infant, though under years of discretion, may be seised to an use; for as well as land might descend unto them from a feoffee to use, so may they originally be infeoffed to an use; yet if it be before the statute, and they had (upon a *subpæna* brought) executed their

estate

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estate during the coverture or infancy, they might have defeated the same; and when they should have been seised again to the use, and not to their own use; but since the statute no right is saved unto them.

If a feme covert or an infant be enfeoffed to an use precedent since the statute, the infant or baron come too late to discharge or root up the feoffment; but if an infant be infeoffed to the use of himself and his heirs, and *I. D.* pay such a sum of money to the use of *I. G.* and his heirs, the infant may disagree and overthrow the contingent use.

CONTRARY law, if an infant be infeoffed to the use of himself for life, the remainder to the use of *I. S.* and his heirs, he may disagree to the feoffment as to his own estate, but not to divest the remainder, but it shall remain to the benefit of him in remainder.

AND yet if an attainted person be infeoffed to an use, the King's title, after office found, shall prevent the use, and relate above it, but until office the *ceſt que uſe* is seised of the land.

LIKE law of an alien; for if land be given to an alien to an use, the use is not void *ab initio*: yet neither alien or attainted person can maintain an action to defend the land.

THE King's villain if he be infeoffed to an use, the King's title shall relate above the use, otherwise in case of a common person.

BUT if the lord be infeoffed to the use of his villain, the use neither riseth, but the lord is in by the common law, and not by the statute discharged of the use.

BUT if the husband be infeoffed to the use of his wife for years, if he die the wife shall have the term, and it shall not inure by way of discharge, although the husband may dispose of the wife's term.

So if the lord, of whom the land is held, be infeoffed to the use of a person attainted, the lord shall not hold by way of discharge of the use, because of the King's title, *An. diem & vastum*.

A PERSON uncertain is not within the statute, nor any estate *in nubibus* or suspense executed: as if I give land to *J. S.* the remainder to the right heirs of *J. D.* to the use of *J. N.* and his heir, *J. N.* is not seised of the fee-simple of an estate *per vit.* of *J. S.* till *J. D.* be dead, and then in fee-simple.

LIKE law, if before the statute I give land to *J. S. per autre vie* to an use, and *J. S.* dieth, leaving *cesty que use*, whereby the freehold is in suspense, the statute cometh, and no occupant entreth; the use is not executed out of the freehold in suspense for the occupant, the disseisor, the lord by escheat: The feoffee upon consideration, not having notice, and all other persons which shall be seised to use, not in regard of their persons but of their title. I refer them to my division touching disturbance and interruption of uses.

IT followeth now to see what person may be a *cesty que use*. The King may be *cesty que use*; but it behoveth both the declaration of the use, and the conveyance itself, to be matter of record, because the King's title is compounded of both; I say not appearing of record, but by conveyance of record. And therefore if I covenant with *J. S.* to levy a fine to him to the King's use, which I do accordingly; and this deed of covenant be not inrol'd, and the deed be found by office, the use vesteth not. *E converso*, inrol'd: if I covenant with *J. S.* to infeoff him to the King's use, and the deed be inrol'd, and the feoffment also be found by office, the use vesteth.

BUT if I levy a fine, or suffer a recovery to the King's use, and declare the use by deed of covenant

tenant enrol'd, though the King be not party, yet it is good enough.

A CORPORATION may take an use, and yet it is not material whether the feoffment or the declaration be by deed; but I may enfeoff *J. S.* to the use of a corporation, and this use may be averred.

A USE to a person uncertain is not void in the first limitation, but executeth not till the person be in *esse*; so that this is positive, that an use shall never be in obeyance as a remainder may be, but ever in a person certain upon the words of the statute, and the estate of the feoffees shall be in him or them which have the use. The reason is, because no confidence can be reposed in a person unknown and uncertain; and therefore if I make a feoffment to the use of *J. S.* for life, and then to the use of the right heirs of *J. D.* the remainder is not in obeyance, but the reversion is in the feoffor (*quousque.*) So that upon the matter all persons uncertain in use, are like conditions or limitations precedent.

LIKE law, if I enfeoff one to the use of *J. S.* for years, the remainder to the right heirs of *J. D.* This is not executed in obeyance, and therefore not void.

LIKE law, I make a feoffment to the use of my wife that shall be, or to such persons as I shall maintain, though I limit no particular estate at all; yet the use is good, and shall in the interim return to the feoffor.

CONTRARY law, if I once limit the whole fee-simple of the use out of land, and part thereof to a person uncertain, it shall never return to the feoffor by way of fraction of the use: but look how it should have gone unto the feoffor; if I begin with a contingent use, so it shall go to the remainder; if I entail a contingent use, both estates are alike subject to the contingent use when

it falleth ; as when I make a feoffment in fee to the use of my wife for life, the remainder to my first begotten son : I having no son at that time, the remainder to my brother and his heirs : if my wife die before I have any son, the use shall not be in me, but in my brother. And yet if I marry again, and have a son, it shall divest from my brother, and be in my son, which is the skipping they talk so much of.

So if I limit an use jointly to two persons, not in *esse*, and the one cometh to be in *esse*, he shall take the intire use ; and yet if the other afterward come in *esse*, he shall take jointly with the former ; as if I make a feoffment to the use of my wife that shall be, and my first begotten son for their lives, and I marry ; my wife taketh the whole use ; and if I afterwards have a son, he taketh jointly with my wife.

BUT yet where words of obeyance work to an estate executed in course of possession, it shall do the like in uses ; as if I enfeoff *A.* to the use of *B.* for life, the remainder to *C.* for life, the remainder to the right heirs of *B.* this is a good remainder executed.

So if I enfeoff *A.* to the use of his right heirs, *A.* is in the fee-simple, not by the statute, but by the common law.

Now are we to examine a special point of the disability of such persons as do take by the statute ; and that upon the words of the statute, where divers persons are seised to the use of other persons ; so that by the letter of the statute, no use is contained ; but where the feoffor is one, and *cestuy que use* is another.

THEREFORE it is to be seen in what cases the same persons shall be both seised to the use and *cestuy que use*, and yet in by the statute ; and in what cases they shall be diverse persons, and yet in by the common law ; wherein I observe unto you three things : First, that the letter is full in the

the point. Secondly, that it is strongly urged by the clause of joint estates following. Thirdly, that the whole scope of the statute was to remit the common law, and never to intermeddle where the common law executed an estate; therefore the statute ought to be expounded; that where the party seised to the use, and the *tesy que use* is one person, he never taketh by the statute, except there be a direct impossibility or impertinency for the use, to take effect by the common law.

X AND if I give land to *I. S.* to the use of himself and his heirs; and if *I. D.* pay a sum of money, then to the use of *I. D.* and his heirs, *I. S.* is in of an estate for life, or for years, by way of abridgment of estate in course of possession, and *I. D.* in of the fee-simple by the statute.

X So if I bargain and sell my land after seven years, the inheritance of the use only passeth; and there remains an estate for years by a kind of subtraction of the inheritance or occupier of my estate, but merely at the common law.

BUT if I enfeoff *I. S.* to the use of himself in tail, and then to the use of *I. D.* in fee, or covenant to stand seised to the use of myself in tail, and to the use of my wife in fee; in both these cases the estate tail is executed by this statute; because an estate tail cannot be re-occupied out of a fee-simple, being a new estate, and not like a particular estate for life or years, which are but portions of the absolute fee; and therefore if I bargain and sell my land to *I. S.* after my death without issue, it doth not leave an estate tail in me, nor vesteth any present fee in the bargain, but is an use expectant.

X So if I enfeoff *I. S.* to the use of *I. D.* for life, and then to the use of himself and his heirs, he is in of the fee-simple merely in course of possession, and as of a reversion, and not of a remainder.

CONTRARY Law, if I enfeoff *I. S.* to the use of *I. D.* for life, then to the use of himself for life, the remainder to the use of *I. N.* in fee: Now the law will not admit fraction of estates; but *I. S.* is in with the rest by the statute. X

So if I infeoff *I. S.* to the use of himself and a stranger, they shall be both in by the statute, because they could not take jointly, taking by several titles.

LIKE law, if I infeoff a bishop and his heirs to the use of himself and his successors, he is in by the statute in the right of his see.

AND as I cannot raise a present use to one out of his own seisin; so if I limit a contingent or future use to one being at the time of limitation not seis'd, but after become seised at the time of the execution of the contingent use, there is the same reason and the same law, and upon the same difference which I have put before.

As if I covenant with my son, that after his marriage I will stand seised of land to the use of himself and his heirs; and before marriage I enfeoff him to the use of himself and his heirs, and then he marrieth; he is in by the common law, and not by the statute; like law of a bargain and sale.

BUT if I had let to him for life only, then he should have been in for life only by the common law, and of the fee-simple by statute. Now let me advise you of this, that it is not a matter of subtily or conceit to take the law right, when a man cometh in by the law in course of possession, and where he cometh in by the statute in course of possession; but it is material for the deciding of many causes and questions, as for warranties, actions, conditions, wavers, suspicitions, and divers other provisoes.

FOR example; a man's farmer committed waste: after he in reversion covenanteth to stand seis'd to the use of his wife for life, and after to the



use of himself and his heirs ; his wife dies ; if he be in his fee untouch'd, he shall punish the waste ; if he be in by the statute, he shall not punish it.

X So if I be infeoffed with warranty, and I covenant with my son to stand seised to the use of myself for life, and after to him and his heirs ; if I be in by the statute, it is clear my warranty is gone ; but if I be in by the common law it is doubtful.

So if I have an eigne right, and be infeoffed to the use of *I. S.* for life, then to the use of myself for life, then to the use of *I. D.* in fee, *I. S.* dieth. If I be in by the common law, I cannot waive my estate, having agreed to the feoffment : but if I am in by the statute, yet I am not remitted, because I come in by my own act : but I may waive my use, and bring an action presently ; for my right is saved unto me by one of the savings in the statute. Now on the other side it is to be seen, where there is a seisin to the use of another person ; and yet it is out of the statute which is in special cases upon the ground ; wheresoever *cesty que use* had remedy for the possession by course of common law, there the statute never worketh ; and therefore if a disseisin were committed to an use, it is in him by the common law upon agreement ; so if one enter as occupant to the use of another, it is in him till disagreement.

So if a feme infeoff a man (*causa matrimonii prælocuti*) she hath remedy for the land again by course of the law ; and therefore in those special cases the statute worketh not ; and yet the words of the statute are general, (where any person stands seised by force of any fine, recovery, feoffment, bargain and sale agreement or otherwise) but yet the feme is to be restrained for the reason aforesaid.

It remaineth to shew what persons may limit and declare an use: wherein we must distinguish; for there are two kinds of declarations of uses, the one of a present use upon the first conveyance, the other upon a power of revocation or new declaration; the latter of which I refer to the division of revocation: now for the former.

THE King upon his letters patents may declare an use, though the patent itself implieth an use, if none be declared.

If the King gives lands by his letters to *I. S.* and his heirs, to the use of *I. S.* for life, the King hath the inheritance of the use by implication of the patent, and no office needeth; for implication out of matter of record, amounteth ever to matter of record.

If the Queen give land to *I. S.* and his heirs to the use of all the church-wardens of the church of *Dale*, the patentee is seised to his own use, upon that confidence or intent; but if a common person had given land in that manner, the use had been void by the stat. of 23 H. VIII. and the use had returned to the feoffor and his heirs. A corporation may take an use without deed as hath been said before; but can limit no use without deed.

AN infant may limit an use upon a feoffment, fine, or recovery, and he cannot countermand or avoid the use, except he avoid the conveyance; contrary, if an infant covenant in consideration of blood or marriage to stand seised to an use, the use is merely void.

If an infant bargain and sell his land for money, for commons or teaching, it is good with averment; if for money otherwise: if it be proved it is avoidable; if for money recited and not paid, it is void; and yet in the case of a man of full age the recital sufficeth.

If baron and feme be seised in the right of the feme, or by joint purchase, during the coverture,

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and they join in a fine, the baron cannot declare the use for longer time than the coverture, and the feme cannot declare alone; but the use goeth according to the limitation of law, unto the feme and her heirs; but they may both join in declaration of the use in fee; and if they sever, then it is good for so much of the inheritance as they concurr'd in; for the law avoucheth all one as if they join'd: as if the baron declare an use to *I. S.* and his heirs, and the feme another to *I. D.* for life, and then to *I. S.* and his heirs, the use is good to *I. S.* in fee.

AND if upon examination the feme will declare the use to the judge, and her husband agree not to it, it is void, and the baron's use is only good; the rest of the use goeth according to the limitation of law.

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